MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1179

ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Petitioners,

vs.

GILBERT STAMM, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners, Environmental Defense Fund, Inc., eleven individually-named rafting companies, and three individuals, and co-petitioner, Sierra Club, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 9, 1973.

[1]Gilbert Stamm is now Commissioner of Reclamation, succeeding Ellis Armstrong, who was a defendant and appellee below, and thus has been substituted as a party pursuant to Rule 48(3) of this Court.

OPINIONS BELOW

The United States District Court for the Northern District of California issued three opinions which are appended hereto and consecutively identified as Appendix A, Appendix B, and Appendix C. The first opinion of the District Court is officially reported at 352 F. Supp. 50 (1972). The second opinion of the District Court has not been reported. The third opinion of the District Court is officially reported at 356 F. Supp. 131 (1973). The opinion of the United States Court of Appeals for the Ninth Circuit is appended hereto and identified as Appendix D. It has not yet been officially reported, but it has been unofficially reported at 6 ERC 1068 (1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 9, 1973. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does an environmental impact statement ("EIS") which refuses to evaluate critically the purported benefits of a proposed major Federal action involving substantial "unresolved conflicts concerning alternative uses of available resources" satisfy the

requirements of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§4321-47?

2. Is a standard which limits judicial review to a determination whether the drafters of an EIS acted "arbitrarily and capriciously in their presentation of information" sufficiently broad to satisfy the purposes of NEPA?

3. Is an EIS describing a Federal multi-purpose water development project in compliance with NEPA, when it ignores the effects of a comprehensive state agency decision imposing conditions upon the utilization of water needed to accomplish the project's purposes?

STATUTES INVOLVED

The statutes involved in this matter are the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321-47, and the Administrative Procedure Act, 5 U.S.C. §706. NEPA, in its entirety, is appended hereto and identified as Appendix E. 5 U.S.C. §706 reads in pertinent part as follows:

> . . . The reviewing court shall —
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> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (D) without observance of procedure required by law;
>
> * * *

STATEMENT OF THE CASE

Upon the decision of this Court whether to grant this petition hinges the fate of a river that the state of California has determined is "a unique asset to the state and the nation."[2] The river is the Stanislaus, a seventy-mile long stream which rises in the high Sierra of eastern California and ultimately flows into the San Joaquin River just south of the delta formed by the two great river systems of California's Central Valley, the San Joaquin and the Sacramento. A nine-mile reach of the Stanislaus which contains alternating stretches of whitewater rapids and placid pools is the most popular locale for whitewater boating in California. This beautiful reach of the Stanislaus also nurtures a renowned trout fishery, and flows through unusual limestone formations containing numerous caves and grottos of great geological significance.

In the Flood Control Act of 1962 (P.L. 87-874, 76 Stat. 1173, 1191), Congress authorized the construction of a 625-foot high earth-filled structure, the proposed New Melones Dam. Once filled, New Melones Reservoir would completely inundate the invaluable nine-mile reach just described. The 1962 Act amended a 1944 Act (P.L. 78-534, 58 Stat. 887, 901) authorizing a much smaller structure at the same site. The 1944 project was designed almost exclusively for flood protection and would not have materially affected the nine-mile reach. As reauthorized in 1962, the New Melones project was designed to provide flood control,

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[2]State Water Resources Control Board Decision 1422, *see* ***Appendix F*** at 24.

irrigation, power, recreation, fish and wildlife enhancement, water quality control, and area redevelopment benefits. Although the U.S. Army Corps of Engineers ("Corps") was to be responsible for the dam's construction, upon completion the project was to be integrated into the larger Central Valley Project and operated by the Department of Interior's Bureau of Reclamation ("Bureau").

The first major contract for work on the project, to construct a diversion tunnel, was awarded in June, 1970, five months after NEPA was signed into law, but well before the issuance of the EIS on the project required by section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C).

Petitioners filed this suit on June 8, 1972, several months before the Corps had scheduled the award of a contract for construction of the dam itself (hereinafter "the main dam contract"), alleging non-compliance with NEPA on the part of the several defendants, including high-ranking officials of both the Department of the Army and the Department of the Interior. Jurisdiction was based on 5 U.S.C. §702 and 28 U.S.C. §§1331(a), 1337, 1361, and 2201-02. On July 17, 1972, the Corps filed a final EIS on the New Melones project with the Council on Environmental Quality ("CEQ"). Petitioners objected to several aspects of the EIS, including principally its explicit determination to omit discussion of the probable impacts of reservoir operation until the dam was near completion. In view of petitioners' contention that a large structure was not needed because the irrigation

potential it would afford was superfluous, this omission in the EIS, in petitioners' view, made the EIS' treatment of "alternatives"[3] to the project wholly inadequate.

In late August 1972, petitioners moved for a preliminary injunction to halt work on the entire New Melones project, specifically requesting that the main dam contract not be let until the EIS prepared by the Corps had been revised to bring it into compliance with NEPA's requirements. Co-petitioner Sierra Club, by then an intervenor in the action, joined petitioners in their motion and various defendant-intervenors joined the Federal defendants in opposing petitioners' request. Contemporaneously, petitioners also moved for consolidation of the hearing on their request for preliminary relief with trial on the merits. This motion was granted and trial on the merits was had September 27-30, 1972.

On November 14, 1972, the District Court issued its first substantive opinion[4] in this action, 352 F. Supp. 50, *see Appendix A*. In its opinion, the Court held that defendants' EIS was inadequate, requiring supplementation dealing with the alternative uses to which the conservation yield (i.e., the water con-

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[3]Section 102(2)(C)(iii) of NEPA, 42 U.S.C. §4332(2)(C)(iii), requires that an EIS describe "alternatives to the proposed action;" section 102(2)(D), 42 U.S.C. §4332(2)(D), requires that "all agencies of the Federal Government shall study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."

[4]Earlier, it had issued an opinion denying the Federal defendants' motion for a change of venue to the District Court for the Eastern District of California.

served for irrigation use) of the reservoir might be put. Without specifying the standard of review it was adopting, however, the Court rejected the other claims petitioners had made respecting inadequacies in the EIS, including deficiencies in the EIS' discussion of alternatives to the project as designed and in the EIS' treatment of the project's costs and benefits. The Court also rejected petitioners' claim that the project should be halted until the State Water Resources Control Board ("Board") had rendered its decision on the Bureau's pending applications for water rights permits. Most important at the time, the District Court also denied petitioners' claim for equitable relief delaying the award of the main dam contract. Instead, it opted to approve a schedule which would have permitted the EIS supplementation to proceed contemporaneously with the contract award and with preliminary preparations for construction of the dam.

Objecting because they felt that the award of the main dam contract might prejudice the chance of reappraisal of the project's merits by the responsible agencies, others within the Administration, Congress, and the public, petitioners immediately sought a stay of the contract award from the Court of Appeals. After a series of temporary stays, prompted in part by a Court of Appeals request soliciting the views of the Attorney General of California on petitioners' application, the Court of Appeals, on January 18, 1973, accepted the Attorney General's advice and ordered a stay of the contract award pending its determination of petitioners' appeal.

In the meantime, on November 28, 1972, a hearing was held in District Court on the adequacy of respondents' draft supplemental EIS dealing with the uses of the project's conservation yield. The next day, November 29, the District Court issued its second opinion, in which the Court found nothing requiring it to enjoin the award of the main dam contract and in which it expressed doubt as to whether the objections petitioners had raised to the revised EIS were legally cognizable.[5]

Following the Court of Appeals stay, the parties stipulated to a revised briefing schedule, which the Court of Appeals then adopted. In exchange for an agreement on petitioners' part not to contest the jurisdiction of the District Court to adjudicate the adequacy of respondents' supplemental EIS, respondents agreed not to seek dissolution of the Court of Appeals stay until all appeals from all District Court orders, including any respecting the supplemental EIS, had been adjudicated by the Court of Appeals.

On March 9, 1973, the District Court conducted a hearing on the EIS as supplemented, and a week later, on March 16, issued its third opinion, 356 F. Supp. 131, *see Appendix C*. In this opinion, the District Court finally rejected all of petitioners' claims, holding that the EIS as revised complied fully with the requirements of NEPA, and retaining jurisdiction to insure that data dealing with the operation of New Melones Reservoir would be forthcoming in a future EIS before New Melones became operational. Among

[5]*See Appendix B* at 3.

the claims which the District Court rejected were allegations: (1) that respondents had not adequately "stud[ied], develop[ed], and describe[d] appropriate alternatives" to the project, §102(2)(D), 42 U.S.C. §4332(2)(D); *see also* §102(2)(C)(iii), 42 U.S.C. §4332(2)(C)(iii); (2) that the EIS had misrepresented the need for the conservation yield of the project which was the principal justification for inundating the precious nine-mile reach petitioners were seeking to protect; and (3) that the imminence of a final decision by the Board on the Bureau's water rights applications dictated a delay in the award of the main dam contract. In rejecting petitioners' second claim, *Appendix C,* 356 F. Supp. at 138, the Court discoursed upon its understanding regarding the scope of judicial review of an EIS, holding that:

> Under NEPA the courts' inquiry must be directed toward ascertaining whether or not certain information is included rather than to a determination of the truth or accuracy of the impression created thereby, absent an allegation that the agency had acted arbitrarily or capriciously in its presentation of information.
>
> 5 U.S.C. §706(2)(A).

Less than three weeks later, on April 4, 1973, the Board issued Decision 1422, approving the Bureau's requests to appropriate water from the Stanislaus, but ordering that the permits granted to the Bureau be subject to twenty-five stated conditions. Crucial among these conditions was one permitting (pending further order of the Board) the impoundment of only

so much water behind New Melones Dam as was required for satisfaction of prior rights, flood control, fish and wildlife enhancement, and water quality. The text of the Board's decision explained the rationale for the Board's action:

> In view of the preponderance of the adverse consequences of maintaining a reservoir of the size proposed by the Bureau, the public interest requires that any permits issued pursuant to Applications 14858 and 19304 prohibit the impoundment of water in New Melones Reservoir for consumptive purposes until further order of the Board following a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife, and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such purposes.
>
> *Appendix F* at 18.

Other parts of the Board opinion indicated that alternative supplies already existed to serve areas outside the Stanislaus River basin and that although an in-basin need for the project's irrigation potential had been demonstrated for some indeterminate date in the future, no facilities had been planned to transport and deliver project water within the basin.

Two weeks after the Board's decision was rendered, an official letter was written to the Under Secretary of the Army by Russell Train, then Chairman of the President's Council on Environmental Quality, the agency authorized by NEPA

> . . . to review and appraise the various programs and activities of the Federal Government in light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto.
>
> §204(3), 42 U.S.C. §4344(3).

The letter, the full text of which appears in the Court of Appeals decision, *see Appendix D,* 6 ERC at 1071 n. 9, expressed the opinion of the CEQ that a supplemental EIS would be a "logical vehicle" for discussing the implications of the Board decision which the CEQ had determined was "a significant new development, requiring some further response by the concerned Federal Agencies before irreversible actions are taken on the project as originally proposed." Neither the Corps nor the Bureau has filed the supplemental EIS requested by the CEQ.

Petitioners' appeal from the three District Court judgments described herein was argued orally on July 9, 1973. On November 9, 1973, the Court of Appeals affirmed the judgments of the District Court and vacated the stay it had granted on January 18, 1973. In holding that the EIS was adequate, the Court of Appeals generally limited itself to a recitation of the objections made by petitioners and to statements of approval respecting the District Court's handling of those claims.

There were three critical holdings in the Court of Appeals opinion. The first came in response to petitioners' claim that the EIS was legally insufficient because it relied upon a single unsupported assertion[6] to establish the propositions that the irrigation potential New Melones would afford was needed and that the alternative of a smaller dam was thus not worthy of substantial consideration. Despite the express findings in Board Decision 1422 to the contrary and the elaborate effort of the District Court to explain how such an extraordinary assertion of need could be justified, the Court of Appeals merely held that:

> The [District Court] found, and we agree, that correctly interpreted the conservation yield of the project could be used now and would clearly be needed by the time the project becomes operational.
>
> *Appendix D,* 6 ERC at 1070.

Second, in disposing of petitioners' NEPA claims, the Court of Appeals held more generally that using the Administrative Procedure Act's "arbitrary and capricious" standard, 5 U.S.C. §706(2)(A), it sustained the District Court's judgment that the EIS met NEPA's requirements.

Finally, the Court of Appeals rejected petitioners' contention that Board Decision 1422 and the CEQ's

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[6] "The simple fact of water supply in the Central Valley Project area is that when all water needs, including environmental needs, are added up there is not enough water available and new water sources are needed." Supplemental EIS, p. B-19; *see Appendix C,* 356 F. Supp. at 138.

letter required the filing of a supplemental EIS before the project could proceed. The Court of Appeals' discussion of this issue was more extensive than its treatment of the other questions raised by petitioners' appeal, but the reasoning behind its holding is difficult to fathom. It seems fair to conclude, however, that the Court of Appeals' principal justification for rejecting the CEQ's position was its view that all the relevant decision-makers had been apprised of the conflicts raised by the Board decision and that, accordingly, a further delay in project construction caused by the filing and circulation of another supplemental EIS was unjustified. The Court of Appeals believed that the Board decision did "not affect the trial court's decision with respect to the adequacy of the EIS upon the project as planned to be built and to operate." *Appendix D,* 6 ERC at 1073. Upon this basis, it seconded the District Court's approval of the EIS "assuming optimum operating conditions as projected by the authorizing agency." Unanswered by the Court of Appeals, however, were the questions posed by the CEQ's letter:

> (1) [W]hat effect does the decision have on the environmental analysis conducted in the existing impact statement?
>
> (2) What arrangements has the Bureau . . . or the Corps . . . made to reassess the alleged benefits of the project against the potential environmental costs in light of Decision 1422?

(3) [W]hat provisions are being made for accommodating the project to an unfavorable [legal] decision (upholding the State's jurisdiction) if that eventually should occur? *Appendix D,* 6 ERC at 1071 n.9.

This petition follows upon the Court of Appeals decision within the requisite ninety (90) days.

REASONS FOR GRANTING THE WRIT

The National Environmental Policy Act of 1969, 42 U.S.C. §§4321 et seq., has not yet been construed by this Court in any significant respect, even though it may be the most important environmental legislation ever passed by the United States Congress. It affects the activities and procedures of almost every agency in the Federal establishment.

In the four years since its passage, substantial conflicts among the lower Federal courts and between the Federal agencies have arisen regarding the appropriate construction of some of NEPA's key provisions. This case presents three such conflicts, two of them judicial, and the third administrative, and it does so upon a complete record which includes three District Court opinions (two of them lengthy) and one Court of Appeals opinion, as well as an expression of views by both the President's Council on Environmental Quality and the State Water Resources Control Board of California.

The Board, the state agency responsible for the allocation of water in California, has termed the

reach of the Stanislaus River which New Melones Dam would inundate "a unique asset to the state and the nation," not worth destroying in exchange for an unneeded additional source of irrigation water. Respondents' environmental impact statement, which petitioners (and the Council on Environmental Quality) contend is inadequate, but which the lower courts held was in compliance with NEPA, discloses neither the fact that the State has reached this conclusion nor the ephemeral nature of the alleged irrigation "need."

Only this Court can remedy this wrong and prevent the illegal inundation of the Stanislaus.

ARGUMENT

I. THE PROPOSED NEW MELONES DAM POSES A CLASSIC "UNRESOLVED CONFLICT" BETWEEN THE PRESERVATION OF A PRICELESS NATURAL RESOURCE AND THE DEVELOPMENT OF A NEW SOURCE OF WATER SUPPLY FOR IRRIGATION; IN ORDER TO ASSESS WHETHER THE IRRIGATION "BENEFIT" OUTWEIGHS THE LOSS OF THE RIVER, RESPONDENTS' EIS SHOULD HAVE CRITICALLY EVALUATED THE NEED FOR IRRIGATION FROM THE STANISLAUS.

In the National Environmental Policy Act, Congress mandated that all agencies of the Federal Government

> . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. §102(2)(D), 42 U.S.C. §4332(2)(D).

Congress also required that in each EIS filed by a federal agency "alternatives to the proposed action" must be described, §102(2)(C)(iii), 42 U.S.C. §4332 (2)(C)(iii). The EIS filed by respondents on the New Melones Dam does not meet the standard these provisions in NEPA establish, because it fails to evaluate critically the need for the irrigation potential a large dam would afford. Without such a critical evaluation it is impossible to compare several of the significant alternatives to New Melones as presently designed (e.g., a smaller dam at the same site; or no dam at all, combined with non-structural flood protection measures).

The lower courts in this action, following respondents' cue, have attempted to avoid this rather simple formulation in two ways. First, they have suggested that as a matter of law no such critical evaluation of the irrigation benefit is required. Second, they have challenged petitioners' contention, now endorsed by the Board, that an additional supply of water for irrigation is presently unnecessary. Respondents and the lower courts are wrong on both counts.

Petitioners maintain that the record[7] does not support the District Court's analysis of water needs which preceded its finding of

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[7]For example, the District Court relies upon increased demands for water quality control even though respondents throughout have denied any obligation to deliver water for water quality control as required in Board decisions. Moreover, the District Court relies upon "requests" for water to establish need despite the fact that the only testimony of record on the subject (from respondents' own witness) establishes that about three-fourths of the uncontracted for water in the Central Valley Project (2,000,000 acre feet out of 2,700,000 acre feet) does not even fall

> . . . a demonstrated need for the New Melones water at least substantial enough to rebut any possible charge that defendants have acted arbitrarily or capriciously in stating that "There is not enough water available and new water sources are needed."
>
> *Appendix C,* 356 F. Supp. at 138.

The important question, however, is not whether petitioners and the Board are correct in concluding that additional irrigation water is not needed nor whether respondents and the lower courts are correct in concluding that it is needed. The important question is whether the simple statement in the EIS—"There is not enough water available and new water sources are needed"—suffices as a description of a salient "fact" which is essential to the justification of the project as planned, or whether a substantial discussion of the "irrigation need," setting forth the claims on both sides of the controversy, should have been presented in the EIS.

The lower courts herein approved an EIS whose only examination of the alleged irrigation "benefit," which purportedly justified choosing an alternative admittedly destructive of the environment, was a one-sentence conclusory remark affirming the need for that benefit. The prevailing view of the other Courts of Appeals which have addressed analogous issues regarding the required scope of an EIS is contrary to the view of the Ninth Circuit. Generally, they have

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in the nebulous "request" category, but rather is merely water "committed" by the Bureau to irrigation use, for which potential buyers have not yet entered the picture. March 9, 1973 hearing, R. Tr. 28, 46.

adopted the approach set forth in *EDF v. Froehlke*, 473 F. 2d 346, 351 (8th Cir. 1972):

> The complete impact statement must contain more than a catalog of environmental facts, however. The agency must also "explicate fully its course of inquiry, its analysis and its reasoning . . . Thus, the complete formal impact statement represents an *accessible* means for opening up the agency decision-making process and subjecting it to critical evaluation by those outside the agency, including the public.[8]

Moreover, an EIS must not only provide an accessible means for reviewing the agency decision, but it must also explore and evaluate alternatives in such a way as to permit them to be sensibly compared:

> Finally, and perhaps most substantively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug. A conclusory statement "unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind" not only fails to crystallize issues . . . but "affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives." . . . Moreover, where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project and its alternatives, these

[8] *See also Calvert Cliffs Coordinating Council v. AEC*, 449 F. 2d 1109, 1114-15 (D.C. Cir. 1971); *Ely v. Velde*, 451 F. 2d 1130, 1139 (4th Cir. 1971); *EDF v. TVA*, 468 F. 2d 1164, 1174-75 (6th Cir. 1972).

> comments may not simply be ignored. There must be good faith, reasoned analysis in response.
>
> *Silva v. Lynn*, 482 F. 2d 1282, 1285 (1st Cir. 1973).[9]

Support for this view comes also from the guidelines of the Council on Environmental Quality in force at the time the New Melones EIS was filed, which stated that:

> A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.[10]

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[9] *See also NRDC v. Morton*, 458 F. 2d 827, 833-34 (D.C. Cir. 1972) ("The impact statement provides a basis for (a) evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action."); *Monroe County Conservation Council v. Volpe*, 472 F. 2d 693, 697-98 (2d Cir. 1972); *Sierra Club v. Froehlke*, 359 F. Supp. 1289, 1353 (S.D. Tex. 1973).

[10] 36 *Fed. Reg.* 7724, 7725 (1971). The current Guidelines are even more conclusive on this point. They require in addition:

> An indication of what other interests and considerations of Federal policy are thought to offset the adverse environmental effects of the proposed action identified pursuant to paragraphs (a)(3) and (5) of this section. The statement should also indicate the extent to which these stated countervailing benefits could be realized by following reasonable alternatives to the proposed action (as identified in paragraph (a)(4) of this section) that would avoid some or all of the adverse environmental effects. 40 C.F.R. §1500.8(a)(8).

Finally, the legislative history of NEPA supports petitioners' position:

> . . . the agency shall develop information and provide descriptions of the alternatives in adequate detail for subsequent reviewers and decision makers, both within the executive branch and the Congress, to consider the alternatives along with the principal recommendations.
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> S. Rep. No. 91-296, 91st Cong., 1st Sess. at 21.

Indeed, the Court of Appeals for the Ninth Circuit now appears to stand alone in taking the view that an EIS which is no more than a catalogue of environmental data is sufficient and that it need not also set forth data of other kinds to permit intelligent reexamination of the agency's decision to proceed. This conflict among the various Circuits is one of the most substantial NEPA issues now being contested in the lower courts. Is an EIS to be a decision-making document, which provides the bulk of the administrative record necessary for judicial review[11] and which evaluates the non-environmental (as well as the environmental) costs and benefits of alternatives to a proposed action—or is an EIS to be merely a compilation of environmental data, essentially valueless because it is impossible to evaluate alternatives in the absence of critical non-environmental information?

This Court should set the question to rest by granting certiorari herein.

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[11] *Cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

II. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS RECOGNIZED ITS OBLIGATION UNDER NEPA TO UNDERTAKE A "THOROUGH, PROBING, IN-DEPTH REVIEW" OF THE ADEQUACY OF AN EIS, A REVIEW WHICH ASSURES "TO THE FULLEST EXTENT POSSIBLE" "THE INTEGRITY OF THE PROCESS OF DECISION."

This case presents squarely an issue which *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), leaves unresolved and which has been the subject of considerable confusion in the lower federal courts in reviewing NEPA cases. What is the standard which governs judicial review of the adequacy of environmental impact statements?

Overton Park, not a NEPA case, involved a decision of the Secretary of Transportation to approve a federal-aid highway which would have destroyed 26 acres of a park. In *Overton Park,* this Court held that under the Administrative Procedure Act, and in particular under 5 U.S.C. §706(2)(A), the Secretary's decision to approve the highway was judicially reviewable. *Overton Park,* however, did not address the separate question whether the record compiled by the Secretary in the exercise of his discretion under §4(f) of the Department of Transportation Act, 49 U.S.C. §1653(f), was adequate to justify his decision. It is this question which has arisen again and again in the NEPA context, where the issue is most often not the propriety of the final decision to proceed but rather is the adequacy of the decision-making document—the EIS—as the basis upon which the final decision is made.

Petitioners herein did not directly attack the Corps' decision to continue construction of New Melones Dam.[12] Rather, petitioners have contended throughout that respondents' EIS was insufficient to enable respondents (or anyone else) to determine whether or not the decision to proceed was wise. In evaluating this claim, petitioners were entitled to a more "searching and careful" inquiry into the facts, *Overton Park,* 401 U.S. 402, 416 (1971), than the lower courts undertook to give them.

The touchstone for judicial review of administrative action, as both lower courts recognized, is 5 U.S.C. §706(2). Unfortunately, however, neither court accepted the gloss which other Federal courts in NEPA cases have placed upon the bare-boned standards in the APA and which approach in fact the "thorough probing in-depth review" which *Overton Park,* 401 U.S. 402, 415 (1971), requires. Illustrative are *EDF v. TVA,* 468 F. 2d 1164, 1174-75 (6th Cir. 1972), which repeatedly emphasizes the language in NEPA that directs agencies to comply with its dictates "to the fullest extent possible" and *Silva v. Lynn,* 482 F. 2d 1282, 1284 n.2 (1st Cir. 1973), where the court stated:

> We have emphasized the word "detailed" because it connotes the careful, reasoned and fully ex-

[12]In dictum, however, the Ninth Circuit took the view that NEPA does not give "the courts the ultimate authority to approve or disapprove construction of a properly authorized project where an adequate EIS has been prepared." 6 ERC at 1074 n.13. This position is in direct conflict with *EDF v. Froehlke,* 473 F.2d 346, 353 (8th Cir. 1972); *Conservation Council v. Froehlke,* 473 F.2d 664, 665 (4th Cir. 1973); and *Sierra Club v. Froehlke,* 486 F.2d 946, 953 (7th Cir. 1973).

plained analysis which we think Congress intended.[13]

The standard of review which the Ninth Circuit adopted in reviewing respondents' EIS stands in stark contrast to the stringent standards its sister Circuits have adopted in such cases as *EDF v. TVA* and *Silva v. Lynn*. If all that an agency must show in order to have an EIS approved is that it did not act "arbitrarily or capriciously in its presentation of information," *see Appendix C*, 356 F. Supp. at 138, then NEPA will swiftly fail of its purpose, which is to command all agencies of the Federal Government to investigate and to disclose fully the impacts of the actions they propose to take. Had the Ninth Circuit in this case adopted a standard of review comparable to the ones used by the Sixth and First Circuits, respondents' EIS would not have passed muster. If full disclosure had been required, respondents' cursory reference to the need for new water sources in the Central Valley would not have met the test.

Accordingly, this Court should resolve the underlying conflict between the Circuits and should examine the record herein using the appropriate standard to determine whether respondents have complied with NEPA's "full disclosure" requirements.

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[13] *See also Wyoming Outdoor Coordinating Council v. Butz*, 484 F. 2d 1244, 1248-49 (10th Cir. 1973); cases cited *supra* at nn. 8, 9.

III. THE STATE WATER RESOURCES CONTROL BOARD DECISION WAS A NEW DEVELOPMENT SO SIGNIFICANT AS TO REQUIRE RESPONDENTS TO FILE A SUPPLEMENTAL EIS BEFORE THEY COMMITTED THEMSELVES FURTHER TO THE PROJECT AS PRESENTLY DESIGNED.

Until the State Water Resources Control Board issued Decision 1422 on April 4, 1973, perhaps this was just ". . . another case challenging the adequacy of an Environmental Impact Statement (EIS) under the provisions of the National Environmental Policy Act of 1969." *See Appendix D,* 6 ERC at 1069. On that day, however, the case took on a unique character, for the Board's decision—based on eleven days of hotly contested adjudicatory hearings—effectively destroyed respondents' principal justification for building a large dam at the proposed New Melones site.

Respondents and their allies naturally have attempted to place a more favorable construction upon the Board's decision, arguing that it leaves open the possibility that the Board will approve the filling of New Melones Reservoir sometime in the future when the irrigation benefits outweigh the loss of the upstream environment that full impoundment would cause. Yet, even respondents must concede that were the dam to be built and the Board decision legally sustained, there is no guarantee that irrigation would ever be considered more beneficial than the upstream recreational and wildlife interests. Moreover, if the Board decision is upheld and an irrigation use is not approved for a substantial period of time, grave doubts exist as to whether the project would still

have a benefit-cost ratio high enough to satisfy Congress that the project should proceed. Respondents have thus put all their eggs in one basket; they are counting on the Federal courts to uphold their suit[14] challenging the Board's jurisdiction over the United States.

The Council on Environmental Quality presumably was aware of respondents' impending legal challenge of the Board's jurisdiction when it inquired in its letter of April 17, 1973, whether "the project as originally designed depends upon a favorable outcome of this legal challenge?" The CEQ had already expressed its conclusion on this question when it said that the Board conditions would

> . . . have significant impact on the operation of the New Melones Reservoir, and might well impair full effectuation of the project purposes.
>
> *Appendix D,* 6 ERC at 1071 n.9.

Based on this reading of the Board decision, the CEQ asked for respondents' views on three issues: (1) the effect of the Board decision on the environmental analysis in the existing EIS; (2) the decision's effect on respondents' assessment of the project's costs and benefits; and (3) the accommodations respondents were making to an unfavorable judicial outcome, should that eventually occur.

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[14]This Court can take judicial notice of the fact that the United States has filed a complaint in the District Court for the Eastern District of California, Civ. S3014, challenging the Board's jurisdiction over the United States. The state had previously filed a complaint in the same Court asserting jurisdiction over the Federal officials who are responsible for the United States' reclamation program, *see Appendix D,* 6 ERC at 1071 n.8.

These questions remain yet unanswered and the EIS stands unchanged. Petitioners submit that respondents' intransigence in the face of the CEQ requests so clearly violates NEPA that a denial of certiorari herein would constitute a severe blow, not only to the viability of NEPA as an environmental reform statute, but also to the proper functioning of the CEQ as the coordinator of the Federal government's activities under NEPA.

The Ninth Circuit's discussion of the Board decision and the CEQ letter begins by stating that Chairman Train's suggestion that a supplemental EIS be prepared and circulated "calls for careful consideration." In fact, however, the Court of Appeals gave the three questions the CEQ had raised no consideration at all. To this day, neither the Congress, nor the public, nor so far as anyone is aware the respondents, have been apprised of the effects the Board's decision might have upon the project as presently designed. The Court of Appeals opines that:

> The decision makers, Corps of Engineers and Bureau of Reclamation, are fully aware of the order, its effect and its implications.
>
> *Appendix D,* 6 ERC at 1073.

Perhaps this is the case, but no one else will know what these implications might be until a supplemental EIS has been filed and circulated in accordance with NEPA procedures.

The Court of Appeals also states that:

> The NEPA has served its purpose. It has stimulated a full examination of all objections, adverse

> consequences, alternatives and, with the decision of the SWRCB, possible operational limitations. *Appendix D,* 6 ERC at 1074.

But the fact is that the "possible operational limitations" have not been elucidated in accordance with NEPA procedures. NEPA, as it has been interpreted by the CEQ, demands that this be done. This Court should grant certiorari to assure that this is done before respondents are committed irrevocably to the construction of a project that will concededly be environmentally destructive (if respondents have their way) or potentially bankrupt (if the State has its way).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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January 30, 1974.

(Appendices Follow)

ENVIRONMENTAL DEFENSE FUND, INC., et al., Plaintiffs,

v.

Ellis ARMSTRONG, Commissioner, Bureau of Reclamation, et al., Defendants.

No. C-72-1057.

United States District Court, N. D. California.

Nov. 14, 1972.

Action by environmental protection groups against the Commissioner of the Bureau of Reclamation, Secretary of the Interior and officers of the Army Corps of Engineers for injunctive and other relief with respect to the proposed New Melones Dam project. On request for preliminary injunction, the District Court, Renfrew, J., held that the Environmental Impact Statement, filed in connection with the proposed New Melones Dam, required further supplementation to deal with the tentative alternative uses to which the conservation yield might be put out that balancing of the equities required that the commencement of construction of the dam not be preliminarily enjoined pending the preparation of the supplemented Environmental Impact Statement.

Order in accordance with opinion.

1. Health and Environment ⇐25.10

While Environmental Impact Statement need not be an exhaustive collection of various and sundry minute scientific details, the statement required by the National Environmental Protection Act should, at minimum, contain such information as will alert the President, the Council on Environmental Quality, the public and the Congress to all known possible environmental consequences of proposed agency action. National Environmental Policy Act of 1969, §§ 102, 102(2)(C), 42 U.S.C.A. §§ 4332, 4332(2)(C).

2. Health and Environment ⇐25.10

The Environmental Impact Statement is not to be merely an exercise in project justification but rather a working paper which is one essential input into agency decisions concerning the contours of federal action. National Environmental Policy Act of 1969, §§ 102, 102(2)(C), 42 U.S.C.A. §§ 4332, 4332(2)(C).

3. Health and Environment ⇐25.10

Where ultimate operation of proposed project is still in doubt at time the Environmental Impact Statement must be filed, tentative discussion or best estimate of possible uses to which the project may be directed is required and the statement should be viewed as interim statement with a revised or supplemental statement filed prior to actual use. National Environmental Policy Act of 1969, §§ 102, 102(2)(C), 42 U.S.C.A. §§ 4332, 4332(2)(C).

4. Health and Environment ⇐25.10

Where the United States was unable at time Environmental Impact Statement was filed to state with any precision the possible uses of the conservation yield of the proposed New Melones Dam on the Stanislaus River, the statement would be required to contain best estimate of possible uses to which the project might be directed, with a revised or supplemental statement to be filed prior to actual use. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Flood Control Act of 1944, § 1 et seq., 58 Stat. 887; Flood Control Act of 1962, § 1 et seq., 76 Stat. 1173.

7. Health and Environment ⊂=25.10

Balancing of the equities required that work on proposed New Melones Dam project be permitted to continue but that the actual construction not be permitted to commence while the Environmental Impact Statement was being supplemented to deal with tentative alternative uses to which conservation yield might be put. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Flood Control Act of 1944, § 1 et seq., 58 Stat. 887; Flood Control Act of 1962, § 1 et seq., 76 Stat. 1173.

8. Health and Environment ⊂=25.10

Portion of Environmental Impact Statement for the proposed New Melones Dam project on the Stanislaus River was adequate with respect to the discussion of alternatives to the proposed dam. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Flood Control Act of 1944, § 1 et seq., 58 Stat. 887; Flood Control Act of 1962, § 1 et seq., 76 Stat. 1173.

9. Health and Environment ⊂=25.10

The agency need not set forth in Environmental Impact Statement at full length views with which it disagrees; all that is required is meaningful reference that identifies the problem at hand for the responsible official. National Environmental Policy Act of 1969, §§ 102, 102(2)(C), 42 U.S.C.A. §§ 4332, 4332(2)(C).

10. Health and Environment ⊂=25.10

It is not necessary that Environmental Impact Statement contain a cost-benefit analysis. National Environmental Policy Act of 1969, §§ 102, 102(2)(C), 42 U.S.C.A. §§ 4332, 4332(2)(C).

11. Health and Environment ⊂=25.5

Discount rate of 3½% was properly used in evaluating cost-benefit ratio for the proposed New Melones Dam project where the rate was that which Congress had authorized to be used in evaluating government projects. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Flood Control Act of 1944, § 1 et seq., 58 Stat. 887; Flood Control Act of 1962, § 1 et seq., 76 Stat. 1173.

12. Health and Environment ⊂=25.10

Fact that the proposed New Melones Dam project would ultimately meet only small fraction of California's power needs was completely irrelevant in assessing adequacy of the Environmental Impact Statement. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Flood Control Act of 1944, § 1 et seq., 58 Stat. 887; Flood Control Act of 1962, § 1 et seq., 76 Stat. 1173.

13. Waters and Water Courses ⊂=133, 142

Under California law, all water rights are conditional and any person wishing to appropriate public water must file application for permit from California Water Resources Control Board. West's Ann.Cal.Water Code, §§ 1200 et seq., 1225, 12205; Federal Reclamation Act of 1902, § 8, 43 U.S.C.A. § 383.

14. Waters and Water Courses ⊂=133

Requirement of California law that any person wishing to appropriate public water must file application with the California Water Resources Control Board for permit applies to federal agencies as well as to other applicants. West's Ann.Cal.Water Code, §§ 1200 et seq., 1225, 12205; Federal Reclamation Act of 1902, § 8, 43 U.S.C.A. § 383.

15. Health and Environment ⊂=25.5

The National Environmental Protection Act commands a harmonization of state and federal agency action. Federal Reclamation Act of 1902, § 8, 43 U.S.C.A. § 383; National Environmental Policy Act of 1969, § 101(b), 42 U.S.C.A. § 4331(b).

16. Waters and Water Courses ⊂=133

Because conditions on water use from the Stanislaus River imposed by the California Water Resources Control Board might affect the possible alternative uses of waters from proposed projects and thereby the nature of the projects themselves, applications by federal agencies for water diversion should be filed and processed to their conclusion at the earliest possible date, and in any

event prior to preparation of the Environmental Impact Statement. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Flood Control Act of 1944, § 1 et seq., 58 Stat. 887; Flood Control Act of 1962, § 1 et seq., 76 Stat. 1173.

13. Health and Environment ⇐25.10

Where revised schedule of construction of proposed New Melones Dam project on the Stanislaus River, when complied with, would permit the preparation of revised Environmental Impact Statement, the issuance of blanket injunction stopping all construction would not speed the preparation of a sufficient Environmental Impact Statement, injunctive action would add significant additional cost to the project and would delay its ultimate completion, preliminary injunction restraining commencement of the project would not issue. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Flood Control Act of 1944, § 1 et seq., 58 Stat. 887; Flood Control Act of 1962, § 1 et seq., 76 Stat. 1173.

16. Health and Environment ⇐25.10

The National Environmental Protection Act does not require that once an Environmental Impact Statement is found deficient in some respect, however slight, work on that project must be enjoined forthwith; the Act does not restrict the court from exercising its equity powers to fashion a decree meeting the needs of the particular case before the court. National Environmental Policy Act of 1969, §§ 102, 102(2)(C), 42 U.S.C.A. §§ 4332, 4332(2)(C).

17. Injunction ⇐147

In order to obtain preliminary injunctive relief, plaintiffs must demonstrate that they will suffer immediate and irreparable injury if the injunction is not granted and that they are likely to prevail on the merits.

18. Injunction ⇐135

Even if there is no showing that plaintiffs will suffer immediate and irreparable injury if injunction is not granted or that plaintiffs are likely to prevail on the merits, it is still within the court's discretion to grant preliminary injunctive relief if it is felt that balancing of the equities so requires.

Michael Palmer, Environmental Defense Fund, Inc., Berkeley, Cal., for plaintiffs.

James Browning, Jr., U. S. Atty., David E. Golay, Asst. U. S. Atty., San Francisco, Cal., for defendants.

RENFREW, District Judge.

This action arises under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (hereinafter NEPA), which requires the filing of an Environmental Impact Statement in connection with any proposed "major Federal action" which will significantly affect the quality of the human environment. The proposed action concerns a public works project known as the New Melones Dam, a 625-foot high structure across the Stanislaus River to impound 2.4 million acre feet of water. When completed, the New Melones Dam will be the second largest earth and rock-filled dam in the country. The project was authorized by Congress under the Flood Control Act of 1944, 58 Stat. 887, and re-authorized by the Flood Control Act of 1962, 76 Stat. 1173. The dam is to be completed in 1978 under the direction of the United States Army Corps of Engineers, and operated thereafter by the United States Bureau of Reclamation and the County Flood Control Associations. An Environmental Impact Statement (hereinafter EIS) was prepared by the United States Army Engineer District, Sacramento, California, in May of 1972 and revised effective June 21, 1972.

Under the original construction schedule, the main dam contract, a project valued at between 60 and 80 million dollars, including the main dam and appurtenances, was to be opened for bidding on October 10, 1972. The contract was then scheduled to be awarded on October 20th, with work commencing, pos-

sibly, as soon as October 30th, ten days after the award.

Plaintiffs brought this action on June 8, 1972, seeking preliminarily to enjoin further work on the dam. Numerous party-intervenors were admitted on both sides. Finally, the hearings on the motion for a preliminary injunction and the trial on the merits were consolidated. The Court then heard testimony from Wednesday, September 27, through Saturday, September 30, 1972. At the conclusion of the presentation of evidence, a lengthy session was held in chambers on Saturday night, September 30th. At that time the Court expressed its preliminary views on the adequacy of the EIS, noting with some concern possible deficiencies in the statement's treatment of the uses to which the conservation yield of the dam might be put. At that time the Court directed the defendants to re-examine the construction schedule with a view towards delaying the commencement of actual construction as late as possible to allow supplementation of the EIS, should the Court ultimately find the present statement to be in fact inadequate.

After the Court's indications in chambers, the Army Corps of Engineers under the direction of Colonel James Donovan extensively revised the construction schedule and proceeded to send out telegrams to all prospective bidders, notifying them of the scheduling changes and instructing them that all bids would be received subject to those changes (the former construction schedule and the new schedule are Appendices A and B hereto, respectively). Under the revised schedule, bidding was to open on October 10, 1972, as originally planned. The awarding of the main dam contract, however, was to be postponed almost six weeks, until December 1, 1972. Issuance of the notice to proceed, permitting the contractor to begin assembling crews and equipment was then to be postponed until December 10, 1972. Most significantly, actual construction of the dam was not to begin until March 5, 1973.

In the interim, the United States Bureau of Reclamation agreed to supply supplemental data on the project to the Corps of Engineers, this material then being added to the EIS to remedy such deficiencies as the Court might find to exist. A preliminary hearing on the status of this procedure was then scheduled for November 28, 1972, with a final hearing on the revised EIS scheduled for February 24, 1973. Under this schedule the public would have time to review the final statement and present its views to the Court as to whether the EIS, as revised, conforms to the requirements of NEPA, well before any work of a permanent nature was undertaken at the construction site. In addition, the schedule afforded plaintiffs time to review the supplemental data and to pursue such remedies as they deemed necessary.

Major credit for this rapid schedulir change, allowing supplementation of E[illegible] prior to the actual commencement of work, is to be given to Colonel James Donovan and his staff. On the shortest of notice they succeeded in altering speedily and imaginatively the schedule of work on a 60 to 80 million dollar project with no detriment to the bidders, the taxpayers, or the parties to the suit.

These scheduling changes were explained to the Court and the parties in chambers on Thursday, October 5, 1972. Final arguments on the adequacy of the EIS and on proposed findings of fact and conclusions of law were then heard on Monday, October 9, 1972, after which the Court, in accordance with the revised schedule, announced in open court that it would allow bids to be opened the following day, October 10th.

Plaintiffs Environmental Defense Fund, Inc., et al. and plaintiff-intervenor Sierra Club seek to enjoin the letting of bids and further work on the main dam contract, contending that (1) defendants have failed to comply with the provisions of NEPA and that (2) defendants have failed to obtain permits from the California Water Resources Control Board to appropriate and divert

water from the Stanislaus River before proceeding with the construction of the New Melones Dam, as required by the California Water Code, § 1201 et seq., and the Federal Reclamation Act, 43 U.S.C. § 371 et seq.

Defendants Ellis Armstrong et al. and defendant-intervenors contend that they have complied with the NEPA both in spirit and in fact as required under Calvert Cliffs' Coordinating Committee v. AEC, 146 U.S.App.D.C. 33, 449 F.2d 1109 (1971). Further, it is contended that even if the statement is technically deficient in some respect, the equities are such that the Court should allow work on the project to continue while the EIS is being supplemented, as was recently done in E.D.F. v. Froehlke, 348 F. Supp. 338 (W.D.Mo.1972).

I

The Stanislaus River has a recorded history of destructive flooding dating back to March, 1907, causing substantial crop, wildlife and property damage to citizens of the Stanislaus River Basin and the Sacramento-San Joaquin Delta. The original New Melones project was thus authorized in 1944 principally as a flood control project, Flood Control Act of 1944, 58 Stat. 887. Since that time, as was demonstrated at trial, substantial water demands have developed in the Basin for purposes of irrigation, fish and wildlife enhancement, power generation, and water quality control. In 1962 Congress therefore re-authorized a substantially enlarged project at the New Melones site, Flood Control Act of 1962, 76 Stat. 1173. As authorized, the dam will sit astride the Stanislaus River, impounding 2.4 million acre feet of water, making it the second largest earth and rock-filled dam in the country. The flood storage control capacity of the dam amounts to 450,000 acre feet, sufficient to protect against the Standard Project Flood, a hypothetical flood equivalent to the worst flood that is likely to occur in a period of between 200 and 500 years.

In 1969 Congress enacted the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., directing all agencies of the federal government to file a detailed Environmental Impact Statement in connection with any major Federal actions significantly affecting the quality of the human environment.[1]

On June 17, 1970, the contract for construction of the diversion tunnel was let, and at the time of trial, approximately 78% of the 25 million dollar project was completed. During the course of the proceedings, it was stipulated by the parties that the tunnel itself was a major Federal action requiring an Environmental Impact Statement,

1. § 4332(2)(C) provides that all agencies of the Federal Government shall—

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes."

but that injunctive relief was not necessary or desirable in light of the near completion of the project.

In May of 1972 the Army Corps of Engineers issued the Environmental Impact Statement covering the construction of the main dam. Suit was brought by plaintiffs in June of 1972, the merits of which we now direct our attention toward, examining first the adequacy of the EIS, second the alleged failure to obtain water permits, and finally, the equities of relief in light of such inadequacies as are found to exist.

II

The National Environmental Policy Act is a legislative expression of the significance this society attaches to the preservation of the environment. As Judge Peckham of this Court noted in Environmental Law Fund v. Volpe, 340 F.Supp. 1328 (N.D.Cal.1972) at 1331:

> "Congress believed that for too many years environmental considerations had been ignored while federal projects blindly forged ahead * * *."

The main foil of the NEPA is the requirement that Environmental Impact Statements accompany all major Federal actions. Section 4332, Title 42, United States Code, which details the factors to be considered in the preparation of such statements, was enacted to insure government agencies would investigate and consider these environmental ramifications, be they apparent or covert.

Because many Federal actions were in some stage of planning or construction when the NEPA was passed, a dispute has emerged in the law as to the extent to which NEPA, and particularly § 4332(2)(C) applies to ongoing projects such as the present project. See, *e. g.*, Brooks v. Volpe, 319 F.Supp. 90 (W.D. Wash.1970); Calvert Cliffs v. AEC, *supra*; Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F.Supp. 238 (M. D.Pa.1970); and Environmental Law Fund v. Volpe, *supra*.

The Court is of the opinion that an EIS clearly is required for the New Melones Project. However, we need not reach this issue in the present case, since all parties have agreed that an EIS was required here. The issue raised goes rather to the adequacy of the EIS which was filed.

[1, 2] The courts have held that while the EIS need not be an exhaustive collection of various and sundry minute scientific details, EDF v. Corps of Engineers, 348 F.Supp. 916 (N.D.Miss.1972), the statement required by the NEPA should, at a minimum, contain "such information as will alert the President, the Council on Environmental Quality, the public, and, indeed, the Congress to all known *possible* environmental consequences of proposed agency action." EDF v. Corps of Engineers, 325 F.Supp. 749, 759 (E.D.Ark.1971). In sum, the EIS is not to be merely an exercise in project justification but rather a working paper of sorts, one essential input into agency decisions concerning the contours of Federal action. Keith v. Volpe, 352 F.Supp. 1324 (C.D.Cal.1972); Calvert Cliffs v. AEC, *supra*; Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971).

In the present case plaintiffs submit that the EIS submitted falls short of such a standard in two principal respects: (1) the statement does not adequately develop, describe, and consider the alternative methods of utilizing the conservation yield of the dam and the environmental impact thereof, as required by 42 U.S.C. § 4332(2)(C)(i); and (2) the statement does not explore all reasonable structural and nonstructural alternatives to the project, as required by 42 U.S.C. § 4332(2)(C)(iii). A number of other deficiencies are also alleged.

Under the present construction schedule, the New Melones Dam will not be completed until 1978. It will then take anywhere from three to ten years for the dam to fill, i. e., to impound its 2.4 million acre feet of water, depending upon the precipitation following its completion.

Approximately 285,000 acre feet constitutes what is known as the conservation yield. The remaining capacity will be used for flood control, fish and wildlife enhancement, maintenance of water quality downstream, etc. It was the government's position at trial that while the EIS dealt extensively with the major uses of the bulk of the impounded water, no discussion of the uses to which the conservation yield would be put was included, because it was felt it was impossible to state with any precision the uses to which that water would be put at the present time. The government therefore proposed to file a separate EIS dealing with the use of the conservation yield, and the environmental impact thereof, at a point nearer in time to the dam's actual operation.

[3] Under the circumstances presented in this case, we hold that where the ultimate operation of a project is still in doubt at the time the EIS must be filed, a tentative discussion or "best estimate" of the possible uses to which the project may be directed is nonetheless required. As such, the EIS should be viewed as an interim statement, the first part of a two-step process whereby the responsible Federal officials would first give their best estimate of the uses to which the project will be put, and then prior to actual use, a revised or supplemental statement should be filed either reaffirming those estimates or describing the newer proposed uses and their environmental impacts.

This situation thus differs in some respects from that found by Judge Pregerson in Keith v. Volpe, *supra*, where further acquisition of property for the Century Freeway in Los Angeles was enjoined because the EIS failed to consider the environmental impact of the noise and pollution arising from the operation of the Freeway. Though we strongly affirm the view expressed therein that construction and ultimate operation of major Federal projects cannot be viewed separately, nor dealt with in separate Environmental Impact Statements, we recognize that the ultimate use to which the conservation yield of a dam is to be put is much more likely to be subject to change than is the ultimate use to which a freeway is to be put.

[4] While we find the EIS's discussion of the uses of the major portion of the New Melones Dam's impounded water to be adequate under NEPA, we find the statement to require further supplementation, as explained, to deal with the tentative alternative uses to which the 285,000 acre feet conservation yield may be put, and the environmental impact thereof. As the uses to which that water will be put become more definite, and, in any event, well before the dam actually becomes operational, additional data should be added to the EIS, discussing those uses and their environmental impact.

[5] It should be noted, however, that on the record presented to the Court, despite the required further discussion, there is no evidence which would lead the Court to find either that the present structure is in any way unnecessary or that a variation in the proposed uses of the conservation yield would in any way change or affect the type or size of the project presently planned. For this reason, and those discussed in section IV herein, we find that a balancing of the equities requires allowing work on the project to continue, but not the commencement of the actual construction, while the statement is being supplemented.

Under the NEPA, 42 U.S.C. § 4332(2)(C)(iii), and under the Council on Environmental Quality Guidelines, 36 Fed.Reg. 7724 (April 23, 1971), 3 Env. Rptr. Current Development 82, 83, 85 (May 19, 1972), the Environmental Impact Statement must include a "detailed statement" of all reasonable alternatives to the proposed action. Plaintiffs allege that the EIS filed by defendants does not adequately discuss possible structural and nonstructural alternatives to the proposed dam.

[6, 7] While the discussion of alternatives to the proposed dam in the EIS is somewhat brief, being five pages in length, on the whole record we find it to be adequate. As the court in Conservation Council of North Carolina v. Froehlke, 340 F.Supp. 222, 228 (M.D.N.C.1972) quoted with approval in holding a seven-page discussion of alternatives to be adequate,

"The agency need not set forth at full length views with which it disagrees, all that is required is a meaningful reference that identifies the problem at hand for the responsible official. Committee for Nuclear Responsibility, Inc., et al. v. Seaborg [463 F.2d 783 (D.C.Cir.1971)].

The question to be asked is whether all reasonable alternatives to the project have been considered, even if some were only briefly alluded to or mentioned. Natural Resources Defense Council, Inc. et al. v. Morton, 337 F.Supp. 167 (D.C. D.C.1971).

In the EIS for the New Melones Project, considered among the nonstructural alternatives to the proposed dam are channel and levee improvements, flood plain management, and abandonment of the project. Among the structural alternatives considered are possible alternative reservoir sizes, including increasing the size of the downstream Tulloch Dam, and alternative reservoir sizes at the New Melones site. In the latter discussion, mention is made of a 450,000 acre-foot structure, a 1,500,000 acre-foot structure, and a two-step reservoir with an initial gross capacity of 450,000 acre feet, with provisions for enlargement to 1,100,000 acre feet. Since the latter project was that which was originally proposed to and authorized by the Congress in 1944, a more detailed discussion of that project might have been included. On the entire record, however, we are not prepared to find the statement's present discussion of proposed project alternatives to be inadequate. Comm. for Nuclear Responsibility, Inc. v. Seaborg, *supra*.

Plaintiffs allege a host of lesser deficiencies in the EIS, all of which the Court finds to be without merit. We deal here only with the two claims most urgently pressed upon the Court.

[8, 9] Plaintiffs argue that the 3½% discount rate employed in evaluating the project is not in keeping with current economic realities, and hence, that a re-evaluation of the project using a more realistic discount rate must be contained in the EIS. We find this argument uncompelling for two reasons:

(1) The 3½% rate, though arguably unrealistic, is that which Congress has authorized to be used in evaluating government projects. As the court in EDF v. Corps of Engineers, 325 F.Supp. 728 (E.D.Ark.1970) noted at 740:

"The methods of calculating cost-benefit ratios are innumerable and in many cases esoteric. The Court's judgment as to sound procedures in this regard might well not be in accord with the judgment of Congress. And, as stated above, the Court does not believe it should, in any event, attempt to substitute its judgment for that of the legislature."

(2) In addition, we find no requirement in the NEPA that any such cost-benefit analysis be conducted or included in the EIS.

For both these reasons, we feel plaintiffs' claims on this ground to be without merit.

[10] Next, plaintiffs contend that somehow, because this dam will meet but a small fraction of the power needs of the State of California by the time it is operational in the early 1980s, the Court must find the EIS to be inadequate. The Court is of the opinion that the fact that the New Melones Project will ultimately meet only a small fraction of the state's power needs is completely irrelevant in assessing the adequacy of the EIS. Again, we find no such required discussion in the language of NEPA.

More importantly, the Court and all parties will readily agree that the power

needs of California in the year 1980 will far outstrip the capabilities of the New Melones Dam, indeed if not those of all present sources of energy in the state combined. The citizens of this state and nation therefore face a very difficult choice in the near future among three possible sources of power—hydroelectric, fossil fuel, and nuclear energy. While it is the hope of this Court that in keeping with the expression of Congressional intent in enacting NEPA, the state's energy requirements will be met in a manner causing the least adverse impact on the environment, this Court has neither the desire nor indeed the authority to pass upon the potential means by which the Congress ultimately decides to meet those power needs.

III

Plaintiffs further allege that before proceeding with the construction of the New Melones Dam, defendants must obtain permits from the California Water Resources Control Board in order to divert or appropriate water from the Stanislaus River, as provided for in the California Water Code, §§ 1200 et seq., and § 8 of the Federal Reclamation Act of 1902, 43 U.S.C. § 383. The Federal defendants concede that permits must in fact be obtained, and, to that end, filed with the Board in 1960 applications 14858, 14859, 19303 and 19304. The numerous delays sought and obtained by defendants in the processing of these applications, it is claimed, were necessary to effect conciliation procedures with the numerous permit protestants, a normal practice in such cases.

[11, 12] Under California law all water rights are conditional and thus any person wishing to appropriate public water must file an application for a permit from the California Water Resources Control Board. Cal.Water Code, §§ 1225 and 1220$\frac{5}{}$. Section 8 of the Federal Reclamation Act, 43 U.S.C. § 383, provides that the provisions enabling the Bureau of Reclamation to acquire water for use in connection with reclamation projects should not be construed to affect or interfere with state laws relating to the appropriation, use, or distribution of water. Thus, the permit requirement applies equally to Federal agencies as well as to other applicants. In re Application 5625 etc. of the Bureau of Reclamation and the California Department of Water Resources, Delta Water Rights Decision, D-1379, page 18.

From 1960 until July, 1972, the Bureau of Reclamation has sought and received repeated delays in the permit hearings to allow the aforementioned nonlitigated settlements to occur. In July of 1972 the Board declined to grant the Bureau's request for a further continuance and on its own motion scheduled hearings on all applications for October and November. These are currently in progress.

[13] Prior to the passage of NEPA, such delays were thought acceptable to all parties concerned in order to simplify proceedings before the Board. NEPA has substantially altered the framework within which such practices must be viewed, however. Basically, NEPA commands a harmonization of state and Federal agency action. 42 U.S.C. § 4331(b) and 43 U.S.C. § 383.

Under recent decisions of the Water Resources Control Board, the Board has the power to take several steps which clearly would affect Federal appropriation permit applications. First, the Board can subrogate permits for use beyond the watershed to those rights initiated by application for use within the watershed regardless of the date of such applications. Delta Water Rights Decision, D-1379. Second, the Board may impose certain restrictions or conditions upon such permits as it grants. Under Decision 1379 the factors which the Board is to consider include (1) the relative benefits to be derived from all beneficial uses of the water concerned, not only those of the applicant, (2) fish and wildlife preservation, (3) uses such as irrigation, consumption, and the generation of electricity, and (4) maintenance of an adequate water supply in the Del-

ta, sufficient for salt water repulsion and water quality control.

[14] Upon inquiry by the Court into the Federal government's position as to the conditions imposed by Decision 1379, the Department of the Interior indicated that it did not regard itself as bound by such conditions insofar as they conflicted with Congressional purposes in authorizing specific water projects.[2] It is beyond the province of the Court in this hearing to decide whether the Bureau of Reclamation is in fact subject to the jurisdiction of the California Water Resources Control Board and its orders. Nevertheless, we conclude that in the future because conditions on water use imposed by the Board may affect the possible alternative uses of water from proposed projects and thereby the nature of the projects themselves, the applications for water diversion should be filed and processed to their conclusion at the earliest possible date, and in any event prior to preparation of the NEPA statement. This is so because the Bureau of Reclamation may acquiesce in the conditions or be found subject to the Board's jurisdiction.

By delaying its applications before the Board, for whatever reasons, the Bureau of Reclamation has made it impossible to evaluate the merits of the proposed project in light of permissible water uses. It is not unreasonable to expect that the Board might place some such conditions upon the permits it grants for diversion of water from the New Melones Dam. Those terms and conditions may have a bearing on the utilization of the dam, and had they been imposed earlier in the life of the project, it is conceivable that they might have affected the design, the location, or the size of the project. If, for example, the Board ultimately required larger than planned downstream releases for water quality control, a smaller structure might adequately meet the project requirements.

By applying as early as is practicable for the water permits, the permissible water uses can be considered in evaluating the various proposed project alternatives. While delays in the processing of these applications may be necessary, the circumstances in this case do not justify a 12-year delay. It is only by thus coordinating Federal and state agency processes as suggested herein that Congressional intent in enacting NEPA will be given effect.

IV

[15] The Court is called upon at this time to determine whether, in view of such defects in the EIS as have been found to exist, preliminary injunctive relief is in order. While the Court has indeed found a defect in the EIS before it in this case, it is the Court's judgment that at this time (1) the revised schedule of construction adopted by the Court, when complied with, will permit the preparation of a revised EIS in order to obtain full compliance with the NEPA, and (2) that the issuance of a blanket injunction stopping all construction would not speed the preparation of, nor enhance the probabilities that, a sufficient EIS will be prepared. Yet such action would add significant additional costs to the project and delay its ultimate completion. Under the circumstances, a proper balancing of the factors to be considered under general prin-

2. The Department of the Interior's position was made known at the Court's request in a telegram from James R. Smith, Assistant Secretary of the Department of the Interior, delivered to Judge Renfrew during the meeting in chambers on Thursday, October 5th. In that telegram Mr. Smith stated:

"We have concluded that the United States of America cannot be made subject to any terms or conditions imposed by a state agency which would in any way interfere with or affect the operations of federal projects for the purposes for which such projects were authorized by Congress.

"Both decisions 1379 and 1400 purport to require the release of federal water stored behind federally constructed dams for purposes other than those contained in the authorizing legislation."

ciples of equity requires that the substantial costs incident to the suspension of work should be avoided while the EIS is being revised. Accordingly, jurisdiction will be maintained to make certain that the schedule adopted is fully complied with.

[16] Plaintiff Environmental Defense Fund argues that, as a matter of law, once an EIS is found deficient in some respect, however slight, work on that project must be enjoined forthwith. We disagree. Nothing in the NEPA, its legislative history, or the cases indicates that the Court is to be thus restricted from exercising its equity powers to fashion a decree meeting the needs of the particular case before the Court.

In Daly v. Volpe, 326 F.Supp. 868 (W.D.Wash.1971), the court found that there had not been strict compliance with NEPA, but weighing the possible injury to the citizens of the community and the state against those likely to be sustained by plaintiffs as a result of noncompliance, the court refused to enjoin work on the project. Other instances of the courts' exercise of their equity powers under the NEPA are found in Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970); Conservation Council v. Froehlke (4th Cir. 1972); Wilderness Society v. Morton, 463 F.2d 1261 (D.C.Cir.1972); Environmental Defense Fund v. Froehlke, 348 F.Supp. 338 (W.D.Mo.1972); and SCRAP v. United States, 346 F.Supp. 189 (D.C.D.C.1972).

[17, 18] In order to obtain preliminary injunctive relief, plaintiffs must demonstrate that (1) they will suffer immediate and irreparable injury if the injunction is not granted, United Fuel Gas Co. v. Railroad Comm. of Kentucky, 278 U.S. 300, 49 S.Ct. 150, 73 L.Ed. 390 (1929); See also Environmental Defense Fund v. Hardin, 325 F.Supp. 1401 (D.C.D.C.1971); and (2) that they are likely to prevail on the merits, Ohio Oil Co. v. Conway, 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972 (1929). Failing this, it is still within the Court's discretion to grant injunctive relief if it is felt that a balancing of the equities so requires.

It cannot validly be contended in this case that continuation of any construction prior to full compliance with NEPA by defendants will wreak irreparable injury on plaintiffs, as required by Sierra Club v. Hickel, *supra*. Under the construction schedule adopted by this Court, no construction having any irreversible impact on the environment will occur prior to March 5, 1973, *after* it has been determined by this Court that defendants have fully complied with NEPA. Moreover, the substantial environmental impact which plaintiffs ultimately seek to fend off will not occur until the dam is actually closed in 1978. Nor can it validly be argued that the power of Congress to change its mind about the project will be precluded by a decision and decree permitting a carefully designed schedule of work to take effect. Sierra Club v. Cliff (E.D.Cal.1972).

As to the likelihood that plaintiffs will prevail on the merits, we have noted that nothing in the record before this Court is likely to lead to a change in the size or type of structure authorized by Congress. In addition, the schedule adopted by the Court will, it is expected, lead to full compliance with NEPA prior to the commencement of any construction by defendants.

Finally, the Court finds that a balancing of the equities requires that work be allowed to proceed on the project while the EIS is being supplemented. Should the New Melones Project be delayed for six months, the parties have stipulated that the approximate increases in costs which would occur amount to 12.6 million dollars. This figure is based on an annual escalation of labor costs of approximately 5% and a seasonal factor necessitated by the fact that certain work on the project must be done during lower water points on the Stanislaus River, thereby limiting the construction season. In addition, if the contractors are forced to rebid the project because of either a delay in opening the bids or

in a postponement of the award date, substantial additional costs would be incurred by the contractors, the subcontractors, and their suppliers in making a second bid.

Also to be weighed in this balance is the potential flood danger to the citizens of the Stanislaus River Basin and the Delta posed by delay in work on the project. See Daley v. Volpe, *supra*.

For the foregoing reasons,

It is hereby ordered that plaintiffs' request for a preliminary injunction is denied.

It is further ordered that the Court retains jurisdiction and the parties are instructed to comply with the scheduling set forth in Appendix C hereto.

APPENDIX A

ORIGINAL CONSTRUCTION SCHEDULE

October 10, 1972	Bids on Main Dam Contract to be opened
October 20, 1972	Award of Main Dam Contract
October 30, 1972	Issue of Notice to Proceed on Main Dam Contract

APPENDIX B

REVISED CONSTRUCTION SCHEDULE

October 10, 1972	Bids on Main Dam Contract to be opened
December 1, 1972	Award of Main Dam Contract
December 10, 1972	Issue of Notice to Proceed on Main Dam Contract
March 5 1973	Actual construction to commence at project site

APPENDIX C

EIS SUPPLEMENTATION SCHEDULE

November 15, 1972	United States Bureau of Reclamation to submit supplemental data on irrigation service areas to Corps of Engineers.
November 22, 1972	Preliminary revised EIS submitted to Court and to the public
November 28 1972	Hearing on preliminary revised EIS in Court
December 1, 1972	EIS supplemental data submitted to other agencies and the public for comment within thirty days.
December 10, 1972	Issue of Notice to Proceed on Main Dam Contract
January 24, 1973	Final revised EIS submitted to Council on Environmental Quality
February 26, 1973	Final revised EIS submitted to Court
February 28, 1973	Hearing on final revised EIS in Court

Appendix B

United States District Court
Northern District of California

No. C-72-1057-CBR

Environmental Defense Fund, Inc., et al.,
Plaintiffs,
vs.
Ellis Armstrong, et al.,
Defendants.

[Filed Nov. 29, 1972]

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER

In the EIS Supplementation Schedule established by this Court in its earlier Memorandum Opinion and Order dated November 13, 1972 (Appendix C), a hearing on the preliminary revised Environmental Impact Statement ("EIS") was scheduled for November 28, 1972. The purpose of this hearing was to allow the parties the opportunity to bring to the attention of the Court any significant defects which were thought to exist in the preliminary revised EIS, thus allowing the Court time to take such action as it thought necessary, including the possibility of en-

joining the awarding of the main dam contract, pending a correction of any such deficiencies.

In accordance with the Court's schedule, the Corps of Army Engineers submitted to the Court, to the parties and to the public the preliminary revised EIS on November 22, 1972.* On November 28, 1972, a hearing was held in open court at which time the Court specifically asked the respective counsel for Environmental Defense Fund ("EDF") and Sierra Club whether either felt there were any substantial errors or omissions in the preliminary revised EIS such as to require the Court to enjoin the awarding of the main dam contract on December 1, 1972, as scheduled in the Court's Revised Construction Schedule (Appendix B to the Memorandum Opinion and Order dated November 13, 1972).

Counsel for plaintiff EDF stated that in the period of time between receipt of the preliminary revised EIS and the hearing, they had not been able to compile and specify the technical deficiences which might exist, and that such deficiencies as were found to exist upon closer examination would be brought to the attention of the Army Corps of Engineers in accordance with the procedures of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4332(2)(C), and the Council on Environmental Quality. At the hearing counsel for EDF reaffirmed its basic position that since the original EIS was found deficient in one respect, the Court was required to enjoin further progress on the project. The Court dealt with

*Environmental Impact Statement, Supplemental Data on Use of Conservation Yield ("preliminary revised EIS").

this argument at some length in its earlier Memorandum Opinion and Order dated November 13, 1972, and remains of the view that it can and must balance the equities, and, in so doing, will not enjoin the award of the main dam contract.

Plaintiff EDF's only specific objections to the preliminary revised EIS were (1) that need for the conservation yield of the project was not demonstrated, and (2) that it failed to show the unavailability of alternate sources of supply to satisfy the demands of the six alternate service areas. In balancing the equities involved, neither of these alleged deficiencies was felt to require enjoining the award of the contract.* Even if these were deficiencies in the preliminary revised EIS, there would still be ample time under the schedule established by the Court in its previous Memorandum Opinion and Order for modification and correction to be made in the EIS prior to the hearing on the final revised EIS which is scheduled to be heard before actual construction commences at the dam site.

Plaintiff Sierra Club expressed its view that nothing it had seen in the preliminary revised EIS could not, with further work and revision, be made to comply fully with NEPA, and that as to the preliminary revised EIS, there was no basis for the Court to enjoin the award of the contract.

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*There is a serious question whether either of these subjects which go to the merits of the project in question are required to be set forth in any environmental impact statement, according to the requirements set by Congress in NEPA, 42 U.S.C. §4332(2)(C), and by the Council on Environmental Quality in its guidelines to federal agencies, 3 Env.Rep., Current Developments (May 19, 1972).

For the foregoing reasons, it is the decision of this Court that nothing in the preliminary revised EIS evidences such noncompliance with NEPA as to require this Court to enjoin the award of the main dam contract.

It Is Hereby Ordered that plaintiffs' motion for a preliminary injunction enjoining the awarding of the main dam contract is denied. The parties are directed to comply with the remaining schedule set forth in Appendix C to the Memorandum Opinion and Order dated November 13, 1972.

Dated: November 29, 1972.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

Appendix C

ENVIRONMENTAL DEFENSE FUND, INC., et al., Plaintiffs,

v.

Ellis ARMSTRONG, Commissioner, Bureau of Reclamation, et al., Defendants.

No. C-72-1057.

United States District Court, N. D. California.

March 16, 1973.

Action by environmental protection groups against Commissioner of Bureau

of Reclamation, Secretary of Interior and officers of Army Corps of Engineers for injunctive and other relief with respect to the proposed New Melones Dam. The District Court, Renfrew, J., supplementing 352 F.Supp. 50, held that the Environmental Impact Statement required supplementation but denied injunctive relief. On supplemental opinion the court held that revised EIS relating to New Melones Dam complied with requirements of NEPA.

Judgment accordingly.

1. Health and Environment ⇐25.5

Record established that all reasonable alternatives to New Melones Dam had been considered and that requirements of NEPA had been met. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

2. Health and Environment ⇐25.10

Where court had previously found that Environmental Impact Statement was fully adequate in its treatment of construction phase of dam and operation of dam but that EIS was incomplete in failing to designate alternative uses to which conservation yield was to be put, fact that revised EIS dealt exclusively with uses to which conservation yield may be put did not render EIS inadequate. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

3. Health and Environment ⇐25.10

Where record clearly indicated that priorities could not meaningfully be determined, there was specific federal statutory language in enabling act establishing such priorities as to federal defendants, and court had explicitly retained jurisdiction over case to insure that data dealing with operation of dam would be forthcoming in future or supplemental EIS well before dam actually became operational, failure to assign priorities of need for water among alternative uses did not constitute noncompliance with NEPA. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Act of Oct. 23, 1962, 76 Stat. 1163; West's Ann.Cal.Water Code, §§ 1250 et seq., 1260(c, f).

4. Health and Environment ⇐25.10

Arguments dealing with merits of proposed project must be addressed to Congress and are not to be considered by court in determining sufficiency of EIS. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

5. Health and Environment ⇐25.10

Under NEPA, courts' inquiry must be directed toward ascertaining whether or not certain information is included in EIS rather than to determination of truth or accuracy of impression created thereby, absent allegation that agency has acted arbitrarily or capriciously in its presentation of information. 5 U.S.C.A. § 706(2)(A); National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

6. Health and Environment ⇐25.5

Record demonstrated need for New Melones water sufficient enough to rebut any possible charge that defendants acted arbitrarily or capriciously in stating that there was not enough water available and new water resources were needed. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

7. Health and Environment ⇐25.5

NEPA does not require that comprehensive study of project be made, viewing system of state and federal water projects as an integrated unit. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

8. Health and Environment ⇐25.5

So long as each major federal action is undertaken individually and not as indivisible, integral part of integrated statewide system, requirements of NEPA are determined on individual major federal action basis. National Environmental Policy Act, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

9. Health and Environment ⇐25.5

In light of record court would not enjoin New Melones Dam Project pend-

ing decision of state water resources control board on applications for water permits. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; West's Ann.Cal.Water Code, §§ 1250 et seq., 1260(c. f).

10. Health and Environment ⇐25.10

Revised EIS relating to New Melones Dam complied with requirements of NEPA. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

Michael Palmer, Environmental Defense Fund, Inc., Berkeley, Cal., for plaintiffs.

James Browning, Jr., U. S. Atty., David E. Golay, Asst. U. S. Atty., San Francisco, Cal., for defendants.

MEMORANDUM OF DECISION AND ORDER

RENFREW, District Judge.

This memorandum of decision and order constitutes this Court's final opinion as to the adequacy of the Environmental Impact Statement ("EIS") filed in connection with the New Melones Project. The project, under the direction of the United States Corps of Army Engineers, involves the construction of a 2.4 million acre feet capacity earth and rock-filled dam known as the New Melones Dam. Plaintiffs and plaintiff-intervenors originally brought suit on June 8, 1972, seeking preliminarily to enjoin further work on the project on the ground that the EIS filed in connection with the project was inadequate in several respects. The motion for a preliminary injunction and the trial on the merits were consolidated, and the case was then tried to the Court on September 27-30 and October 9, 1972.

The Court issued its first opinion in this matter on November 14, 1972, Environmental Defense Fund v. Armstrong, 352 F.Supp. 50 (N.D.Cal.1972). Viewing the project to be discussed in the EIS as including both the construction and the actual operation of the dam, as urged by plaintiffs, the Court found that the EIS was fully adequate in its treatment of the construction phase of the project and that it was also adequate in its treatment of the operation of the dam, except for the discussion therein of the uses to which the 285,000[1] acre-foot conservation yield would be put. The Court found that the failure to designate, at least preliminarily, the alternative uses to which the conservation yield was to be put, and the environmental impact thereof, mandated a finding that the EIS was incomplete under the standards set out in the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq., and the Council on Environmental Quality Guidelines, 36 F.R. 7724.

However, after hearing extensive arguments from both sides, both in chambers on October 5, 1972, and in open court on October 9, 1972, the Court concluded in its opinion and order that a balancing of the equities required that the initial work on the project (though no actual construction) not be preliminarily enjoined pending the necessary supplementation of the EIS, as long as the Court retained jurisdiction and thus the power to restrain the commencement of actual construction work on the project in the event the revised EIS did not meet the requirements of NEPA. The Court clearly determined that such initial work as would occur was activity involving the ordering of equipment, the assembling of work crews, and the like, none of which could have any impact on the environment, adverse or otherwise.

The factors which led the Court to this conclusion were not only the substantial costs to be endured by the tax-

1. There is evidence that the conservation yield will be only 250,000 acre feet if it is used to meet local needs. This is because water releases for water quality of approximately 35,000 acre feet per year on a long-term basis will be needed. However, if the New Melones yield is pumped from the Delta, it will be approximately 285,000 acre feet, and the latter figure is used throughout this opinion.

payers were the project delayed, estimated to be some 12 million dollars at a minimum, and the increased flood hazard posed by such delay, but also the more general interest of effectuating compliance with Congressional dictates. The Court finally decided that in light of the relatively minor defects in the statement, the issuance of a blanket injunction stopping all such initial work on the project, not simply actual on-site construction, would in no way speed the preparation of a sufficient EIS and was therefore inappropriate.

Nonetheless, the Court made it abundantly clear to all concerned that no work on the project which would in any way affect the environment or indeed the site itself could be undertaken prior to completion and submission of a revised EIS which was found by the Court to comply with the requirements of NEPA. It was thus clearly understood by those contracting and undertaking the initial non-construction activity that they did so at their own risk, and that should the project later be enjoined because the EIS was not adequately supplemented, they would bear the costs incurred thereby.[2]

Accordingly, after extensive meetings in chambers with the parties on September 30 and October 5, 1972, the Court drew up a revised construction schedule and a schedule for implementation of the EIS. Environmental Defense Fund v. Armstrong, *supra*, at 61. Under those schedules, no work was to be undertaken at the construction site until March 5, 1973, which was after the final hearing on the revised EIS scheduled for February 28, 1973, which thus gave the Court ample opportunity to enjoin the actual construction of the project in the event the requirements of NEPA had not been met. In the interim, supplementary data on the proposed alternative uses of the conservation yield was to be submitted by the Bureau of Reclamation to the Corps of Army Engineers and a preliminary or draft revised EIS prepared. The draft statement was then to be submitted to the Council on Environmental Quality ("CEQ") and to the public, as required under NEPA and the CEQ Guidelines.

On November 28, 1972, the first of two scheduled court hearings on the revised EIS was held. At that hearing, the Court, having studied the draft EIS submitted to it on November 22, 1972, afforded counsel for the Environmental Defense Fund and the Sierra Club an opportunity to comment upon the revised statement, noting any deficiencies therein, and to present to the Court any reasons why the Court should alter either the construction or the supplementation schedules. At the hearing, counsel for plaintiffs offered no reason why, in light of the preliminary revised EIS, the Court's schedule should be altered, much less why the project itself should be preliminarily enjoined. Rather counsel reasserted its views that (1) there would be a total loss of the white water were the dam built, an environmental impact which the Court already had held to have been fully discussed in the first EIS, and (2) that once the Court found a deficiency in the EIS, it could not balance the equities but was required, as a matter of law, to enjoin the entire project. As the Court noted in its earlier opinion, Environmental Defense Fund v. Armstrong, *supra*, at 60:

> "Nothing in the NEPA, its legislative history, or the cases indicates that the Court is to be thus restricted from exercising its equity powers to fashion a decree meeting the needs of the particular case before the Court."

Following the November 28th hearing, the Court issued its first Supplemental Memorandum Opinion and Order, in which the Court explained that, having been presented with no reason to alter the schedule as initially announced, the parties were to adhere to that schedule.

2. Colonel Donovan, District Engineer, advised all bidders by telegram of the revised construction schedule set forth in Appendix B to the court's first opinion before the bids were opened on October 10, 1972.

On November 28th, the Court of Appeals for the Ninth Circuit issued a temporary injunction enjoining the Federal defendants from certain action concerning the contract for construction of the dam until December 8, 1972. After several continuations, the Court of Appeals issued an opinion on January 18, 1973, continuing the injunctive relief pending disposition of the appeal. The Court of Appeals then scheduled briefing to conform to the supplementation schedule so as to have a final judgment on the adequacy of the EIS from this Court prior to the commencement of its deliberations.

Accordingly, on January 24, 1973, the final revised EIS was to be submitted to the CEQ, thereby allowing at least thirty days for public and agency comment on the statement prior to the taking of any action,[3] as required under section 10 of the CEQ Guidelines, 36 F.R. 7724. On February 28, 1973, the hearing on the final revised EIS was to be held, after which the Court would determine whether the EIS, as supplemented, fully complied with the requirements set down in NEPA. At the February 28th hearing, however, it was learned that, contrary to the Court's order of November 14, 1972, and possibly in violation of the CEQ Guidelines, the draft revised EIS submitted to the Court and to the public on November 22, 1972, had apparently not been lodged with the CEQ at that time, and therefore had not fulfilled the 90-day filing requirement of the CEQ Guidelines. The hearing was therefore postponed until March 9, 1973, in order that the Federal defendants could determine precisely when the statement was filed and consequently, how long it did sit with the CEQ.

At the continued hearing on March 9, 1973, however, it was revealed that the draft revised EIS had in fact been supplied to the CEQ on November 28, 1972, and the requirements of the CEQ Guidelines thereby satisfied. Further, counsel for both Environmental Defense Fund and the Sierra Club waived any objections which they may have had to any failure to comply with the filing requirements of the CEQ Guidelines. Thus, the Court proceeded with the continued hearing on the merits as to the adequacy of the revised EIS for the New Melones Project.

At the hearing, plaintiffs offered three reasons why the Court should find that the defendants had not in fact fully complied with the NEPA. These were, first, that as amended, the EIS is still

3. In a letter to the Court of Appeals dated January 3, 1973, the California Attorney General misconstrued the purpose of the Court's revised schedule. His assertion that that schedule would have permitted the main dam contract to be awarded only nine days after the Court-ordered supplement to the EIS was made public completely ignores the fact that the schedule specifically provided that no major federal action would be taken which might have any adverse effect on the environment unless and until the Court found that the supplement to the EIS met the requirements of NEPA. Thus, while the Attorney General's office fails to note that the preliminary revised EIS was in fact made public on November 22, 1972, and not on December 1, 1972, the Court feels that to focus on that time period, prior to the awarding the contract, is to miss the point of the schedule established by this Court on November 14, 1972.

The hearings on the preliminary revised EIS on November 28, 1972, and on the final revised EIS on February 28, 1973, were designed to afford all parties the opportunity to bring to the Court's attention any deficiencies in the EIS which would require enjoinment of the project. The Court by its schedule specifically provided for compliance with the 90-days and 30-day filing periods required under the CEQ Guidelines, 36 F.R. 7724, prior to the commencement of any actual construction at the site. The fact that the contract had been awarded on December 10, 1972, was of no relevance since the costs which might have been engendered by any delay to or injunction of the project, were the EIS subsequently found to be inadequate, were to be assumed solely by the contractor, and thus of no possible prejudice to the public, the government, or the Court, in the fashioning of any equitable decree or in reaching a determination whether the requirements of NEPA had been met.

deficient in that it does not deal with any of the deficiencies alleged to exist in the original May 1972 EIS, but, rather, deals exclusively with the use of the conservation yield of the New Melones Dam. Second, they contend that the supplemental EIS is itself inadequate because (a) it does not assign priorities of need for water among the service areas that it suggests may potentially use New Melones water, (b) it omits all facts regarding the current water supply situation in the Central Valley Project and the need for additional irrigation in California, and (c) it fails to discuss possible alternate sources of supply. Finally, plaintiffs contend that the project should be preliminarily enjoined until the State Water Resources Control Board has reached a decision on the applications for water rights permits. We now turn our attention to the merits of these claims.

Plaintiffs first claim that the EIS is still inadequate in that it does not deal with any of the deficiencies alleged to exist in the original May, 1972 EIS, but rather, deals exclusively with the use of the conservation yield of the New Melones Dam. Specifically, it is claimed that the EIS does not describe the East Side Division or the environmental impact which might be occasioned by its construction, that the EIS does not disclose the variances in costs and benefits that would result if interest rates different from the authorized rate were used in evaluating the economic feasibility of the project, and that the EIS does not discuss alternatives to the dam as currently designed.

[1] Each of these alleged deficiencies was raised in the trial on the merits and the Court, in its opinion of November 14, 1972, found against the plaintiffs on each of these points, dealing with them at some length in that opinion. Having considered the matters, the Court reaffirms its view as to each contention. As to plaintiffs' claim that the Court should reconsider its decision in light of the Fourth Circuit's reversal of Conservation Council v. Froehike, 340 F.Supp. 222 (M.D.N.C.1972), reversed Froehlke v. Conservation Council, 473 F.2d 664 (4th Cir., Feb. 8, 1973), we note simply that in discussing the EIS treatment of alternatives to the structure, the language which this Court quoted from the reversed case was actually quoted by the *Froehlke* court with approval from Committee for Nuclear Responsibility, Inc., et al. v. Seaborg, 149 U.S.App.D.C. 380, 463 F.2d 783 (1971). More importantly, however, this Court is of the view, expressed previously, that all reasonable alternatives to the project have been considered, even if some were only briefly alluded to or mentioned, and that therefore, the requirements of NEPA have been met. Environmental Defense Fund v. Armstrong, *supra*, 352 F.Supp. at 57.

[2] Thus, while the plaintiffs' contention that the revised EIS deals exclusively with the uses to which the conservation yield may be put is clearly true, a reading of this Court's opinion of November 14, 1972, reveals that this is as it should be, since the only deficiency which the Court found in the EIS was its discussion of the uses to which the yield would be put, and it was only on that point that the Court ordered supplementation of the EIS. Accordingly, the Court finds plaintiffs' first claim to be without merit.

The plaintiffs then challenge the sufficiency of the supplementary EIS itself. The first deficiency alleged is the statement's failure to assign priorities of need for water among the service areas that may potentially use New Melones water, which, it is alleged, renders useless for critical analysis by the decisionmakers the data contained therein. A mere cataloging of potential service areas, it is claimed, without an attempt to assess the relative priorities of those areas does not constitute a "best estimate" of the possible uses to which the conservation yield may be put, as required by this Court in its earliest decision. Environmental Defense Fund v. Armstrong, *supra*, at 56. The Court

must reject this argument for several very important reasons.

First, before any appropriation or diversion of water can occur, California Water Code § 1250 et seq. requires that a permit be obtained from the State Water Resources Control Board. Under § 1260 of the Water Code, all such applications must set forth, among other things, the nature and the amount of the proposed use and the place where it is intended to use the water. Cal.Water Code § 1260(c) and (f). In the case of the New Melones Dam, however, it is certain that no diversion of water will occur for at least another eight years. Under these circumstances, it is in fact impossible to assign priorities of use to the New Melones water at the present time. Authority for the view that it is premature to do so at the present time is found in the comments to Colonel Donovan from Secretary of Resources for the State of California, N. B. Livermore, Jr.:

> "It is recognized that the actual place of use of the project yield cannot be determined at this time because changes in demand and other factors are likely to occur between now and 1980, the earliest date when the yield would be available from New Melones Lake. A significant factor that could influence the area of use will be the decision on project water rights by the State Water Resources Control Board." Supplemental EIS, Attachment A.

Aside from the practical problems of assigning priorities at the present time, an examination of the authorizing statute itself reveals that definite priorities are established therein. 76 Stat. 1163 (1962). It is provided at 1191 that:

> "[B]efore initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined."

It would thus appear that at least as far as federal defendants are concerned, Congress has itself established a priority of uses, and that any further discussion thereof in the EIS would be pointless.

Finally, independent of the practical difficulties of designating priorities at the present time, the language of the enabling act, and the requirements of the California Water Code, this Court has sought to assure that at least additional data, and more probably a second EIS, would be forthcoming dealing specifically with the operation of the project by retaining jurisdiction over this matter and overseeing it through its development. As the Court said in its opinion, Environmental Defense Fund v. Armstrong, *supra*, at 56:

> "[T]he EIS should be viewed as an interim statement, the first part of a two-step process whereby the responsible Federal officials would first give their best estimate of the uses to which the project will be put, and then prior to actual use, a revised or supplemental statement should be filed either reaffirming those estimates or describing the newer proposed uses and their environmental impacts."

[3] Accordingly, the Court finds that at present the failure to assign priorities of need for water among the alternative uses does not constitute noncompliance with NEPA where, as here, the record clearly indicates that (a) the priorities cannot meaningfully be determined at the present time, (b) there is specific Federal statutory language in the enabling act establishing such priorities as to Federal defendants, and (c) where the Court has explicitly retained jurisdiction over the case to insure that data dealing with the operation of the dam is forthcoming in a future or supplemental EIS, well before the New Melones Dam actually becomes operational. Accordingly, the Court must reject

plaintiffs' first reason for claiming the supplemental EIS itself to be deficient.

As a second reason for finding the supplemental EIS itself to be inadequate, plaintiffs allege that it does not contain any information about the current availability of water in the Central Valley Project or the need for additional irrigation in California. This omission is affirmatively misleading, it is claimed, because it leads the decision-makers to believe that there is now a critical shortage of supply in the Central Valley Project and a need for more irrigation in California, when, in fact, there is substantial controversy as to both these needs.

[4, 5] Initially, it must be recognized that plaintiffs are not claiming that the EIS does not contain information as to current supply and irrigation needs, but, rather, they are disputing the sense of the information which is contained therein. Accordingly, the Court determines that the deficiencies alleged go not to the adequacy or inadequacy of the EIS as revised, but to the merits of the project itself. The latter are something upon which Congress and not the courts must pass, and plaintiffs' objections must therefore fail. Under NEPA the courts' inquiry must be directed toward ascertaining whether or not certain information is included rather than to a determination of the truth or accuracy of the impression created thereby, absent an allegation that the agency had acted arbitrarily or capriciously in its presentation of information. 5 U.S.C. § 706(2)(A).

Even if the Court were to assume that plaintiffs were alleging that the Corps and the Bureau had so acted in their preparation of the supplemental EIS, thus requiring the Court to go to the merits somewhat, plaintiffs would fail. Their claims are based upon a chart entitled "Central Valley Project—Sacramento River Basin and Delta Water Supply—1972 Contract Quantities—Present and Projected Uses," attached as Exhibit Four to their memorandum of February 26, 1973. On the basis of that chart, it is claimed by plaintiffs that there is a greater supply of water than is presently under contract. Their claims must fail for two reasons. First, the chart deals with water under contract only and does not include present and future requests for water, which are in fact quite substantial.[4] Second, aside from these additional requests for water, other important water demands were not accounted for on the chart. Aside from the contracted for water and assuming, no matter how unrealistically, that the state itself does not increase its present level of water diversion, no account has been made for the increased demands on the various projects for purposes of water quality control under Decision 1379 and Decision 1400 which the State Water Resources Control Board might see fit to impose upon the permits granted the projects.[5] Also to be considered are the very substantial water demands for fish and wildlife preservation being urged at the water rights hearings by the State Department of Fish and Game.[6]

[6] Accordingly, the Court finds a demonstrated need for the New Melones water, at least substantial enough to rebut any possible charge that defendants have acted arbitrarily or capriciously in stating that "There is not enough water available and new water sources are needed." EIS at B-19. Ac-

4. In fact, when taking into account the ultimate amounts of water contracted for and the requests for water received to date, they exceed the supply of water available today in the Central Valley Project.

5. Requirements by the California Regional Water Quality Control Board for total-dissolved-solids control in the Stanislaus River and in the San Joaquin River amount to 70,000 acre feet.

6. At the water rights hearing, the California Department of Fish and Game presented information demonstrating the need for 263,000 acre feet, or virtually the entire conservation yield of the New Melones Project.

cordingly, plaintiffs' second alleged deficiency in the supplemental EIS must fail.

Plaintiffs' third and final claim that the supplemental EIS is itself inadequate is based on their allegation that the failure of the statement to discuss possible alternative sources of supply, some of which may have a lesser economic and/or environmental cost than the New Melones Project, is affirmatively misleading.

Initially, the Court would point out that the original May 1972 EIS did in fact deal with alternatives to the New Melones structure and, hence, with alternative sources of supply. As noted both earlier in this opinion and in the opinion of November 14, 1972, the Court finds that the discussion of alternatives therein was adequate.

[7, 8] The Court also understands the plaintiffs urging that a comprehensive study of the Central Valley Project be made, viewing the system of state and federal water projects as an integrated unit. While the Court agrees with the wisdom of so doing, NEPA itself does not so require. In Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1972), a comprehensive study had been undertaken but not completed before impact statements had been prepared for certain major federal actions. The Court held that there was no error in proceeding with impact statements for those projects prior to completion of the comprehensive study. Here, no comprehensive study has been commenced, let alone completed. Under these circumstances there is no requirement under NEPA that the EIS with respect to the New Melones Project be delayed until a comprehensive study of the Central Valley Project be completed. So long as each major federal action is undertaken individually and not as an indivisible, integral part of an integrated state-wide system, then the requirements of NEPA are determined on an individual major federal action basis. Plaintiffs' suggestion that there is need for a comprehensive study of the Central Valley Project should be made to the Congress, and not to the Court.

The Court is also somewhat concerned by the thrust of plaintiffs' arguments as to alternate sources of supply. By requiring the exploration of all other possible sources of supply, and their respective environmental impacts, plaintiffs place an impossible task upon defendants in the preparation of such statements by requiring them to examine an ever-expanding range of alternatives to the project, and then alternatives to those alternatives. Accordingly, this Court has held only that plaintiffs must discuss all reasonable alternatives to the present project and their environmental impacts, Natural Resources Defense Council, Inc., et al. v. Morton, 337 F. Supp. 167 (D.C.1971), and that in this case they have in fact done so.

Having examined each of plaintiffs' three bases for claiming the supplemental EIS itself to be deficient,[7] and having found each to be without merit, the Court holds that the EIS as revised, including both the original and the supplemental statements, complies fully with

7. The Court is concerned with the failure of plaintiff Environmental Defense Fund (EDF), which is assumed to be inadvertent, to make a complete disclosure of its position with respect to alternate sources of supply. EDF points to the Auburn-Folsom South Project as one such alternative while it has both publicly opposed and sued to enjoin construction of that project and, in so opposing, have offered the New Melones Project as an alternate source of supply. However, before this Court it did not disclose that it had sued to enjoin construction of the Auburn-Folsom South Project nor did it disclose in its opposition to the Auburn-Folsom South Project that it also sued to enjoin the New Melones Project. The Court disapproves the practice in which one project is played against another, without complete disclosure of the opposition to both projects. The Court does not question EDF's good faith in opposing both projects, only its apparently inadvertent failure to so disclose.

the requirements of NEPA. The Court therefore directs its attention to the last of plaintiffs' reasons for urging that activity on the New Melones Project be enjoined.

Finally, plaintiffs contend that aside from any question of the adequacy of the EIS, the project should be preliminarily enjoined until the State Water Resources Control Board has made a decision on the applications for water rights permits in connection with the New Melones Project.

Viewing the project and the permits in perspective, the Court notes that we are really dealing with only 285,000 acre feet of the 2.4 million acre feet of the project. Having found the equities of the situation to go against plaintiffs when the EIS was initially found to require further supplementation, the Court feels that they now weigh even more heavily against them where the statement is in fact adequate and where the water permits of concern to plaintiffs involve such a small part of the total project.

A further consideration on this point is the time delay involved. Decisions 1379 and 1400 were issued in 1971 and are currently in the early stages of federal litigation, the cases having recently been removed from state court to the United States District Court for the Eastern District of California. The time delay involved is thus not simply one of a month or two, at which time the decision on the permits will be issued, but perhaps two or three years until the courts decide whether the present injunction on the application of those decisions should be lifted or not, and, in essence, whether those two decisions will be given effect. Again, the delay would be occasioned by permits involving only a very minor part of the total project.

[9] Accordingly, this Court is of the view that it would be both unwise and unjust to enjoin the entire project pending a decision of the State Water Resources Control Board on the applications for water permits. This is particularly so where, as here, the Court has retained jurisdiction and has required that before the conservation yield is to be utilized, defendants file a final EIS as to the operation of the project and the environmental impact thereof.

This opinion and the two earlier opinions of the Court in this matter, issued on November 14, 1972, and November 29, 1972, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules.

[10] Accordingly, the Court finds that the Environmental Impact Statement, as revised, complies fully with the requirements of NEPA, and that the relief plaintiffs seek must be denied.

The Court will, however, pursuant to these opinions, retain jurisdiction over this matter to insure a full compliance with its order that there be filed a further Environmental Impact Statement or at least additional data on the operation of the project prior to the actual use of any of the conservation yield of the dam.

EDF v. ARMSTRONG

U. S. Court of Appeals
Ninth Circuit

ENVIRONMENTAL DEFENSE FUND, INC., et al., v. ELLIS ARMSTRONG, Commissioner, Bureau of Reclamation, et al.; ENVIRONMENTAL DEFENSE FUND, INC., et al., and THE SIERRA CLUB v. ELLIS ARMSTRONG, Nos. 72-2997 and 72-3170, November 9, 1973

WATER

1. Federal, state, and local regulation — Administrative agencies — Judicial review — In general (§28.6311)

Court jurisdiction and procedure — In general (§40.01)

Administrative Procedure Act's "arbitrary and capricious" standard, 5 U.S.C. Sec. 706(2)(A), rather than "clearly erroneous" standard of Section 52(a) of Federal Rules of Civil Procedure, is proper standard to be used by U.S. court of appeals in reviewing federal district court's decision concerning adequacy of Bureau of Reclamation's National Environmental Policy Act environmental impact statement on New Melones Dam.

2. Federal, state, and local regulation — Navigable waters (§28.35)

Federal, state, and local regulation — Administrative agencies — In general (§28.601)

National Environmental Policy Act is satisfied by Bureau of Reclamation's New Melones Dam environmental impact statement that adequately discusses dam's adverse environmental effects and alternatives to dam, even though it does not discuss possible effects of California's imposition, after statement was filed, of conditions governing bureau's appropriation of river water.

STATUTES

Federal — National Environmental Policy Act (§95.011)

Construed.

Michael W. Palmer and Thomas J. Graff, Berkeley, Calif., and Harry D. Page and Paul A. Dezurick, of Graham & James, San Francisco, Calif., for appellant EDF.

Edmund B. Clark, Kent Frizzell, Douglas N. King, and George R. Hyde, Department of Justice, Washington, D.C.; James L. Browning, Jr., U.S. attorney, and David E. Golay,

assistant U. S. attorney, San Francisco; Thomas J. Shepard and Robert C. Morrison, of Neumiller, Beardslee, Siegert, Glahn, Shepard & Greene, Stockton, Calif.; Richard W. Dickenson, county counsel, and Michael N. Garrigan, deputy county counsel, Stockton; Paul R. Haerle and Joseph A. Darrell, of Thelen, Marrin, Johnson & Bridges, San Francisco; P. H. McCarthy, Jr., of McCarthy, Johnson & Miller, San Francisco; and D. Stephen Blake, Sacramento, Calif., for appellees.

Full Text of Opinion

Before: HASTIE,* TRASK and CHOY, Circuit Judges.

TRASK, Circuit Judge:

This is another case challenging the adequacy of an Environmental Impact Statement (EIS) under the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §4321 *et seq.* (NEPA). The statement was filed because a public works project known as the New Melones Dam across the Stanislaus River in California constituted a "major Federal action" which would significantly affect the quality of the human environment. The dam was originally authorized by Congress under the Flood Control Act of 1944 and reauthorized under the Flood Control Act of 1962, 76 Stat. 1180, as a multi-purpose project with benefits of flood control, irrigation, fish and wildlife enhancement, power generation and water quality control. The diversion tunnel, a 25 million dollar project, had been substantially completed at the time this action was filed and was therefore not the subject of requested relief. The main construction contract had not been let and this action concerns that contract and the completion of the project. An injunction pending the resolution of this appeal has stayed further project action.

The principal plaintiff is Environmental Defense Fund, Inc. (EDF),[1] joined by eleven rafting companies engaged in the business of conducting commercial raft trips on the white water reaches of the Stanislaus River, two individuals who allege that their raft and kayak trips will be injured by the proposed construction, and one individual who alleges his mining claim will be destroyed. Defendants are the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, the Secretary of the Army and various officers of the Corps of Engineers.[2]

The matter has been before the District Court on two occasions. On the first hearing the court determined that:

1. The plaintiffs' request for a preliminary injunction should be denied.

2. A supplemental EIS should be submitted by the government discussing the uses of the water produced as the "conservation yield" of the project. This EIS was to be submitted to other concerned agencies and to the public inviting comment within 30 days after submission.

3. The final revised EIS should be submitted to the Council on Environmental Quality and to the court and thereafter a second hearing was to be held, with the court retaining jurisdiction of the matter pending final hearing. *Environmental Defense Fund, Inc., et al. v. Ellis Armstrong, Commissioner, Bureau of Reclamation, et al.*, 352 F.Supp. 50 [4 ERC 1760] (N.D. Cal. 1972).

A second EIS was promptly prepared entitled "Supplemental Data on Use of Conservation Yield," and circulated as required, and the final revised EIS submitted to the Council on Environmental Quality (CEQ) and to the public. At the continued hearing before the District Court on March 9, 1973, both the EDF and the Sierra Club waived any objections to a failure to comply with the filing or circulation requirements set out in the CEQ guidelines, and the court proceeded to consider the question of the adequacy of the revised EIS for the New Melones Project.[3]

Three objections were made to the adequacy of the EIS in its final form. The first was that the supplemental portion dealt only with the conservation yield. This argument was rejected summarily by the court upon the ground that the conservation yield was precisely that to which the trial court had directed the government to address its comments.

Second, complaint was made that the final

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* Honorable William H. Hastie, United States Circuit Judge for the Third Circuit, sitting by designation.

[1] Intervenor on the side of the plaintiffs is The Sierra Club.

[2] Intervenors on the side of the defendants are The County of Calaveras, the Calaveras County Water District, San Joaquin County Flood Control and Water Conservation District, County of Stanislaus, County of Tuolumne, City of Escalon, City of Riverbank, City of Modesto, City of Oakdale, City of Ripon, City of Stockton, Salida Sanitary District, Reclamation District 2075, San Joaquin River Water Users Company, Federal Land Bank Association of Modesto, Federal Land Bank Association of Stockton, Stanislaus River Flood Control Association, Del Rio Golf and Country Club, Gerald Barton, Mac Giovanetti, John Hertle, Manuel Macedo, Paul A. Philbin, Raymond Arroquy, Donald R. Fairchild, William Jiminez, Mountain Counties Water Resources Association, Associated General Contractors of California, Inc., California State Conference of Operating Engineers and State Building and Construction Trades Council of California.

[3] In the meantime this court issued a temporary injunction restraining construction which was later continued in effect after final disposition in the District Court until this appeal could be determined.

EIS did not assign priorities of need for the conservation yield, and did not discuss alternate sources of supply and the facts regarding the current water supply in the Central Valley Project of which this dam was alleged to be a part. On this latter issue, the trial court held that it was not the task of the EIS to examine all possible alternative sources of water supply but only those that are reasonable with regard to the project under examination. This was done. We agree with and affirm the judgment of the trial court that the EIS was in fact adequate.[4] As to the assignment of priorities, the trial court pointed out that there was a time lag of at least eight years between the commencement of construction and the accumulation of the conservation pool. It would be improvident to make a priority commitment now for needs which might be vastly changed when the water became available. The court's conclusion, to retain jurisdiction throughout the project's development, provides sufficient protection for all parties. The evidence of available water supply without New Melones, and thus the project's need, was in no real conflict. There was a dispute as to the evaluation of that evidence. The court found, and we agree, that correctly interpreted the conservation yield of the project could be used now and would clearly be needed by the time the project becomes operational.

The third challenge to the final statement was for the reason that alternatives for the project were not sufficiently set forth. Yet in the original statement before supplementation, there was a discussion of alternative reservoir sites (original EIS at 73); alternative reservoir sizes at the New Melones site; alternatives to the planned operation such as releases downstream to enhance fisheries and water quality and to meet the demands of other nearby service areas; and alternatives to constructing the reservoir itself, such as channel and levee improvements, floodplain management and abandonment of the project. Again, prior to the initiation of the conservation function of the pool, the Bureau of Reclamation, charged with operation, proposes to prepare another supplementary statement covering the impact of the use of its water supply.

The District Court thereupon found that the Environmental Impact Statement as revised complied fully with the requirements of NEPA and denied relief to the plaintiffs.

Two questions are before us on this appeal. The first is the matter of appellate review of the decisions of the District Court upon the issues raised there. The second is the effect of a decision of the California State Water Resources Control Board (SWRCB), numbered 1422, which was issued shortly after this appeal was taken.

[1] Each of the parties to this appeal appears to advocate that the standard for appellate review of a trial court decision on the adequacy of the EIS, is the "clearly erroneous" test under section 52(a) of the Federal Rules of Civil Procedure.[5] An examination of the Act and of the cases decided under it, do not support such a conclusion. More often, the courts look to the provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).[6] *Life of the Land v. Brinegar*, No. 73-1784 [5 ERC 1780] (9th Cir. Sep. 10, 1973); *Silva v. Lynn*, No. 73-1200 [5 ERC 1654] (1st Cir. July 5, 1973).[7] We do likewise here.

The EIS as revised has been reviewed on appeal and we agree with the judgment of the District Court as to its adequacy under NEPA requirements, as measured by 5 U.S.C. § 706(2)(A).

The final question is one which has developed pending the appeal. In the trial court the plaintiffs had contended that before proceeding with construction the government must obtain permits from the SWRCB. In 1960 the federal defendants had filed applications for permits to appropriate water from the Stanislaus River by direct diversion and by storage. The applications were made pursuant to sec-

[4] The second opinion of the District Court in this matter is reported in 356 F.Supp. 131 [5 ERC 1153] (ND Cal. 1973). Attention is invited to both opinions for the details of the controversy which is discussed generally herein, and for the excellent discussion by the court of the legal issues involved.

[5] Where the question is the threshold jurisdictional test of whether the Act applies or does not apply, the standard is whether the plaintiff has alleged facts which, if true, show that the proposed project would materially degrade any aspect of environmental quality. *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 [4 ERC 1941] (5th Cir. 1972). *Compare Hanly v. Kleindienst*, 471 F.2d 823, 829 [4 ERC 1785] (2d Cir. 1972), using the "arbitrary and capricious" standard, and the cases cited at 471 F.2d 823, 829 n.9.

Where the Act creating the Agency has established a special standard of review, that standard will of course apply. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 467 [3 ERC 1232] (2d Cir. 1971).

[6] 5 U.S.C. § 706(2)(a) provides in pertinent part:

"... [T]he reviewing court shall—

• • •

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ..."

[7] *But see Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 [4 ERC 1933] (9th Cir. 1973), which uses 5 U.S.C. § 706(2)(D) as the appropriate standard, permitting appellate review of findings and conclusions found to be "without observance of procedure required by law." Under the circumstances of this case, either test would lead to the same result.

tion 1200 *et seq.* of the California Water Code and section 8 of the Federal Reclamation Act of 1902, 43 U.S.C. § 383. Between 1960 and 1972 the Bureau of Reclamation had sought delays in order to negotiate differences, but in 1972 the SWRCB forced the matter to hearing, which was the posture of the case when this litigation was decided on March 16, 1973. *See Environmental Defense Fund, Inc. v. Armstrong*, 356 F.Supp. 131, 140 [5 ERC 1153] (N.D. Cal. 1973); *Environmental Defense Fund, Inc. v. Armstrong*, 352 F.Supp. 50, 58 [4 ERC 1780] (N.D. Cal. 1972). On April 4, 1973, the SWRCB issued its Decision 1422, granting the requests sought by the Bureau of Reclamation in part and imposing conditions. It is not known at this time whether the Bureau has taken any further action with respect to the decision of the State Board.[9]

This decision was promptly made known to both the responsible agency and to the CEQ for, under date of April 17, 1973, a letter was written by Russell E. Train, Chairman of the Council to Kenneth E. BeLieu, Under Secretary of the Department of the Army, calling attention to it.[10] The suggestion of Chairman Train that another supplemental draft EIS be prepared and circulated calls for careful consideration. We turn then to Decision 1422 of the SWRCB for an answer to that question.[11]

After describing the project, the decision notes the protests to the applications filed by the irrigation districts and public agencies pointing out that "most of the protestants now

[9] The official position of the Bureau of Reclamation with respect to the authority of SWRCB over it was made known to the trial court by telegram from James R. Smith, Assistant Secretary of the Interior, in response to a request from the trial court. 352 F.Supp. 50, 59 n.2. The position in substance was that the Bureau was not subject to terms and conditions imposed by a state agency.

We take judicial notice of the fact that on June 12, 1973, the Attorney General of California filed an action, Docket Number C-73-0984, in the United States District Court for the Northern District of California on behalf of the SWRCB against the Secretary of the Interior, and the Commissioner of Reclamation to establish whether the state agency may impose conditions upon the federal agency. On July 20, 1973, the case was transferred to the United States District Court for the Eastern District of California, where it is now pending.

We are also advised by the appellant Sierra Club, in its opening brief that the obligation, if any, of the Bureau of Reclamation to comply with orders of the State Water Resources Control Board is presently subjudice in *Central Valley Eastside Project Assn. v. SWRCB*, (E.D. Cal. Civ. No. S 2582); and in *Kern County Water Agency v. SWRCB*, (E.D. Cal. Civ. No. S 2583).

[10] "EXECUTIVE OFFICE OF THE PRESIDENT
Council on Environmental Quality
722 Benson Place, N.W.
Washington, D.C.

"Dear Mr. BeLieu:

"I am writing in regard to the New Melones Reservoir project being proposed by the Corps of Engineers. The project is now before the U.S. Court of Appeals for the Ninth Circuit on the issue of NEPA compliance.

"The outcome of the State Water Resources Control Board deliberations on New Melones water rights has been a central question in the case. The Board issued Decision 1422 on April 4, 1973, getting out the States' position on water rights. The Bureau of Reclamation was granted water rights permits, but subject to 25 limitations and conditions. These conditions will have significant impact on the operation of the New Melones Reservoir, and might well impair full effectuation of the project purposes.

"We have reviewed Decision 1422 along with the final environmental impact statement and its supplement. It appears to us that the Board's decision constitutes a significant new development, requiring some further response by the concerned Federal agencies before irreversible actions are taken on the project as originally proposed. In particular, we would like to know the views of the Corps of Engineers and/or the Bureau of Reclamation on the following issues:

"1. If Decision 1422 is ultimately accepted as controlling on the water rights issue, what effect does the decision have on the environmental analysis conducted in the existing impact statement?

"2. What arrangements has the Bureau of Reclamation or the Corps of Engineers made to reassess the alleged benefits of the project against the potential environmental costs in light of Decision 1422?

"3. Since The Bureau of Reclamation is challenging State jurisdiction over the water rights issue, does this mean that the project is originally designed depends on a favorable outcome of this legal challenge? If so, what provisions are being made for accommodating the project to an unfavorable decision (upholding the State's jurisdiction) if that eventually should occur?

"We think that a supplemental draft environmental impact statement would be [sic] logical vehicle for discussing these questions and the implications in general of Decision 1422—particularly if the environmental analysis conducted in the original statement is found to be significantly affected by the Decision. It is important that some response to the issues raised by the Board's decision be prepared and circulated for review by interested parties prior to further action. In this connection it may be appropriate to request postponement of the present litigation until the agencies involved have had an opportunity to conduct such a reappraisal.

"I look forward to hearing from you soon. Please give me a call if you have any questions or wish to discuss the matter.

"Sincerely,
"/s/ Russ
"Russell E. Train
"Chairman

"Honorable Kenneth E. BeLieu
Under Secretary
Department of the Army
Washington, D.C. 20310"

[11] References to pages of the SWRCB decision are to the decision as reprinted in the appendix to the Defendants'-Intervenors' brief.

have no objection to the project." Their principal concern, it states, is in the "manner in which the project will be operated." The plaintiffs in this case were, of course, also protestants before the Board; their protests, as indicated, go beyond those of the public corporations and agencies.

The Board first considers the amount of water that should be released to satisfy requirements for achieving and maintaining water quality objectives (pp. 11-13). It concludes that the Board should reserve jurisdiction for the purpose of revising water release requirements for water quality objectives.

Use of the conservation yield for irrigation or other consumptive uses is next discussed (pp. 13-20), and the Bureau is criticized for failing now to present evidence of a specific plan to use the conservation yield for designated consumptive uses. The Board points out, however, that the record contains "substantial evidence that the full conservation yield of the New Melones Project, and more," will eventually be needed in the counties of the Stanislaus River Basin.[11] It then proceeds to balance the undefined needs for impoundment against the adverse consequences of impoundment including injury to white water boating, stream fishing and other stream-related activities, and decides that permits should prohibit impoundment for additional consumptive purposes until further order of the Board. It further provides that permits for consumptive purposes outside the basin counties should be subordinate to beneficial uses within the counties. The restriction of use of the water to satisfy existing and anticipated intra-basin needs before export was already a part of the project authorization.[12]

Releases for preservation and enhancement of fish and wildlife are next discussed (pp. 20-21) concluding with a decision that permits should require the release of up to 98,000 acre feet per annum for maintenance of fish and wildlife with jurisdiction reserved to revise these releases "upon reviewing the results of further studies."

Releases for consumptive uses to satisfy dry year criteria are mentioned but no specifics are stated.

Hydroelectric Power Development is the next item reviewed (pp. 21-24). In considering storage for power the Board's opinion becomes obscure. It begins by saying that because there is considerable question as to the need for storage of water "in the proposed quantities for purposes other than the generation of power," it will determine whether the project's "power benefit alone" will justify storage in addition to that presently needed for other purposes. Measured by this yardstick it concludes that the adverse recreational effects on stream fishing, white water boating and wildlife weigh more heavily than the need for power and thus the requested storage may not be allowed in full. It acknowledges that this reduction in storage will reduce the annual electrical energy production and admits that the opportunity to contribute to the solution of present power supply problems should not be overlooked, but notes that the project was not

[11] "The record contains substantial evidence that the full conservation yield of the New Melones Project, and more, will eventually be needed in Tuolumne, Calaveras, San Joaquin and Stanislaus Counties (RT 145-147, 1131). These four counties include substantial areas in the Stanislaus River basin and are considered by the Bureau to be entitled to preference in the use of project water, based on the provisions of Public Law 87-874 and the California County of Origin Law (Water Code Sec. 10505) (RT 144). The Board agrees, as explained later in this decision.

"The limited unappropriated water resource of the State should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future. When the evidence indicates, as it does here, that an applicant already has a right to sufficient water to meet his needs for beneficial use within the foreseeable future, rights to additional water should be withheld and that water should be reserved for other beneficial uses. In this case, existing surplus supplies that are available to the Bureau should be utilized before storage is allowed in New Melones Reservoir to satisfy demand for more water in service areas outside of the four basin counties.

"Although the full conservation yield of the project will be required for future development of the four basin counties, no facilities have been planned up to now to serve project water in these counties and no contracts have been negotiated for such service. The record is not clear how soon water use agencies will be ready to execute any such contracts.

"The lack of evidence that New Melones Project water will be needed for consumptive use outside the four basin counties for many years to come, if ever, and that it will be used within those counties at any definite time in the future, raises substantial doubt whether permits should be issued to impound more water in New Melones Reservoir, at least at this time, than is needed for satisfaction of prior rights and non-consumptive purposes—protection and enhancement of fish and wildlife, water quality, recreation and generation of power."

* * *

"*Permits to impound water for flood control are not required and were not requested." Brief for Defendant-Intervenors County of Calaveras, App. A at 16-17, Decision 1422, State Water Resources Control Board.

[12] "[B]efore initiating any diversion of water from the Stanislaus River Basin in connection with the operation of the Central Valley Project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin, and the diversion shall at all times be subordinate to the quantities so determined." 76 Stat. 1163, 1191.

proposed as a means of alleviating the power shortage. It makes plain also that "as the demand for water for consumptive uses increases and storage for those uses is authorized, storage for power purposes will also be considered." It notes that if the Bureau eventually substantiates the need for storage for consumptive use purposes out-of-basin, large quantities of delivery power will be needed and the development of the full power potential of New Melones should be considered.

The summary of the Board is as follows: (in part)

"The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for other beneficial uses. Therefore, although there is a demonstrated need for the full yield of the project in the four basin counties at some time in the future, but for which no contracts have been negotiated, and in view of the adverse effect the proposed reservoir will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantiated.

• • •

"Beneficial use of project water can be made for the generation of power. However, preservation of the existing upstream reach of the river for recreation values conflicts with increased storage for power purposes. Therefore, storage for power generation should be approved, but limited to the amount authorized for other project purposes."

The order approves the applications in part and provides that the requested permits issue subject to conditions and limitations stated. The conditions and limitations are with respect to the manner in which the project is to be operated. It imposes no restriction upon the size of the construction project or the ultimate capacity of the dam as planned by the Bureau. It reduces the quantity of water to be appropriated under Application 19303 from the 2,420,000 acre feet per annum by storage, as requested, to the quantity, not to exceed 1,420,000 acre feet per annum, which can beneficially be used for power purposes. It reduces the quantity of water to be appropriated under Application 19304 for irrigation, domestic, municipal, industrial, fish culture, recreation and water quality control purposes from the 2,420,000 acre feet per annum by storage to a maximum of 1,420,000 acre feet per annum and states in this regard that "[u]ntil further order of the State Water Resources Control Board, the water shall be used only for preservation and enhancement of fish and wildlife, recreation and water control purposes." Paragraph four of the order continues with reference to permits under applications 14858 and 19304 and authorizes use of water therein approved, for consumptive uses in Stanislaus, Calaveras, Tuolumne and San Joaquin Counties and invites a petition to amend to include other areas where necessary.

Assuming that the order as outlined is final, is not modified in further proceedings and is binding upon the federal agency, *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), the federal agency has obtained permission to construct the project as planned but its operation is limited by the decision to a reduction of one-half of its proposed capacity for storage for power purposes. By such a reduction the recreational uses are preserved. Jurisdiction is retained to permit an increase in actual storage should a justifiable need be demonstrated.

The decision makers, Corps of Engineers and Bureau of Reclamation, are fully aware of the order, its effect and its implications. The Bureau of Reclamation was the applicant before the State Board in the proceeding which resulted in Decision 1422. The Chairman of the Council of Environmental Quality also has the decision. It does not affect the trial court's decision with respect to the adequacy of the EIS upon the project as planned to be built and to operate. It does affect the operation of the project by protecting those who have objected on behalf of white water enthusiasts, stream fisherman and wildlife interests. It is subject to modification by its own terms upon change of conditions and recognizes that "there is a demonstrated need for the full yield of the project" at some time in the future. Therefore, the summary states that the Board "should retain jurisdiction over the permits for the purpose of approving incremental appropriations when the need for the water is substantiated."

There appears agreement that the project cannot be completed in any event until some eight to ten years from date of beginning of construction. How the water and power needs may change during that period is problematical. Litigation is now pending to determine whether and to what extent the order of the Board may be binding upon the federal defendants.

[2] The District Court has twice examined the adequacy of the EIS assuming optimum operating conditions as projected by the authorizing agency and has held that it is adequate as revised and supplemented. We have examined those proceedings carefully and

agree with the District Court. The NEPA has served its purpose. It has stimulated a full examination of all objections, adverse consequences, alternatives and, with the decision of the SWRCB, possible operational limitations. It now becomes a question of project justification in the light of all known and possible consequences.[1] Future changes which may have a significant effect upon the environment, not heretofore examined, may be brought to the attention of the District Court under its reserved jurisdiction.

We affirm the judgments of the District Court and vacate all orders granting injunctions by this court.

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[1]We do not read the National Environmental Protection Act to give to the courts the ultimate authority to approve or disapprove construction of a properly authorized project where an adequate EIS has been prepared and circulated in accordance with the NEPA requirements. There has been some uncertainty in the views of other courts upon this issue. *Compare Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 786-87 [3 ERC 1126] (D.C. Cir. 1971), *with Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 297 [4 ERC 1721] (8th Cir. 1972). *See also Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 [3 ERC 1558] (D.C. Cir. 1972); *City of New York v. United States*, 344 F.Supp. 929, 940 [4 ERC 1646] (E.D. N.Y. 1972); *Hanly v. Kleindienst*, 471 F.2d 823, 840 [4 ERC 1785] (5th Cir. 1972) (Friendly, J. dissenting). We have taken the view that final judgments of project justification are not subject to review in an action to consider the adequacy of an EIS statement under NEPA. *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1276, 1279-80 [4 ERC 1933] (9th Cir. 1973). Congress in reauthorizing the project and in determining whether to proceed in the light of the EIS must consider many other factors in addition to the environmental effects. Those questions are not before us and properly so.

Appendix E

*The National Environmental Policy Act of 1969**

An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

PURPOSE

SEC. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

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* 42 U.S.C. §4321 *et seq.*, 83 Stat. 852, Pub. L. 91-190. The United States Code sections correspond to the section numbers of the Public Law in the following manner:

Section 2 is 42 U.S.C. §4321
Section 101 is 42 U.S.C. §4331
Section 102 is 42 U.S.C. §4332
Section 103 is 42 U.S.C. §4333
Section 104 is 42 U.S.C. §4334
Section 105 is 42 U.S.C. §4335
Section 201 is 42 U.S.C. §4341
Section 202 is 42 U.S.C. §4342
Section 203 is 42 U.S.C. §4343
Section 204 is 42 U.S.C. §4344
Section 205 is 42 U.S.C. §4345
Section 206 is 42 U.S.C. §4346
Section 207 is 42 U.S.C. §4347

Alphabetical and numerical subsections are the same in the Public Law and the United States Code. Only Public Law citations are given in the text.

TITLE I

Declaration of National Environmental Policy

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) Assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) Identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) Include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the

quality of the human environment, a detailed statement by the responsible official on—

(i) The environmental impact of the proposed action,

(ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) Alternatives to the proposed action,

(iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) Recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) Make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) Initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) Assist the Council on Environmental Quality established by title II of this Act.

SEC. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104. Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

Council on Environmental Quality

SEC. 201. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the

"report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

SEC. 202. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

SEC. 203. The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

SEC. 204. It shall be the duty and function of the Council—

(1) To assist and advise the President in the preparation of the Environmental Quality Report required by section 201;

(2) To gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;

(3) To review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) To develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

(5) To conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) To document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) To report at least once each year to the President on the state and condition of the environment; and

(8) To make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

SEC. 205. In exercising its powers, functions, and duties under this Act, the Council shall—

(1) Consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) Utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

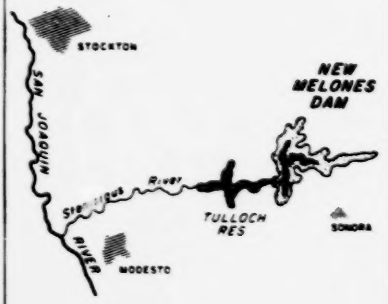
SEC. 206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

SEC. 207. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1 million for each fiscal year thereafter.

Approved January 1, 1970.

Appendix F

NEW MELONES PROJECT WATER RIGHTS DECISION



In the Matter of Applications 14858, 14859, 15303 and 15304 to Appropriate from the Stanislaus River in Calaveras and Tuolumne Counties.
U.S. Bureau of Reclamation, Petitioner and Applicant

DECISION 1422

April, 1973

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 14858, 14859, 19303 and 19304 to Appropriate from Stanislaus River in Calaveras and Tuolumne Counties.	Decision 1422
U. S. BUREAU OF RECLAMATION, Petitioner and Applicant	

DECISION GRANTING PETITION FOR ASSIGNMENT OF APPLICATIONS AND APPROVING APPLICATIONS IN PART

BY THE BOARD:

U. S. Bureau of Reclamation, hereinafter referred to as "Bureau" having filed a petition for assignment of Applications 14858* and 14859 and having filed Applications 19303 and 19304 for permits to appropriate unappropriated water; protests having been received; a public hearing having been held before the State Water Resources Control Board commencing on October 26, 1972; applicant, protestants and other persons having appeared and presented evidence; the evidence received at the hearing having been duly considered, the Board finds as follows:

Substance of the Applications

1. (a) Application 14858 is for a permit to appropriate 8,800 cubic feet per second (cfs) by direct diversion,

*Applications 14858 and 14859 were originally filed by the Department of Finance pursuant to Water Code Section 10500 and were subsequently transferred to the State Water Resources Control Board pursuant to Water Code Section 10504. The Bureau has filed a petition for assignment of these applications which petition includes proposed completed applications in its name as required by Water Code Section 10504 and board rule (California Administrative Code, Title 23, Section 800).

year-round, and 980,000 acre-feet per annum (afa) by storage to be collected from October 1 of each year to July 1 of the succeeding year for irrigation, domestic, municipal, industrial, fish culture, recreation and water quality purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

(b) The foregoing information is identical in Application 14859 except that its purpose of use is power generation.

(c) Application 19303 is for a permit to appropriate 6,000 cfs by direct diversion and 2,400,000 afa by storage, both year-round, for power generation from Stanislaus River in Calaveras and Tuolumne Counties.

(d) Application 19304 is for a permit to appropriate 2,250 cfs by direct diversion and 2,400,000 afa by storage, both year-round, for irrigation, domestic, municipal, industrial, fish culture, recreation and water quality control purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

The primary point of diversion under all four applications is at the proposed New Melones Dam which will be located within the SW¼ of SW¼ of Section 11, T1N, R13E, MDB&M, on the Calaveras County-Tuolumne County boundary line. A proposed Knights Ferry diversion dam which will be located downstream from New Melones Dam within the SW¼ of NE¼ of Section 21, T1S, R12E, MDB&M is also listed as a point of direct diversion under Applications 14858 and 19304.

Applicant's Project

2. The U. S. Corps of Engineers has under construction a multipurpose project, known as New Melones, on the Stanislaus River approximately 35 miles northeast of the City of Modesto. The principal feature of the project will be a dam to be constructed approximately three-quarters of a mile downstream from the present Melones Dam and reservoir which has a capacity of 112,000 acre-feet. The new reservoir will have a capacity of 2,400,000 acre-feet and will inundate the existing dam and reservoir. The New Melones project will be operated and maintained by the Bureau and it will be an integrated part of the Central Valley Project (CVP).

The proposed place of use for water conserved by the project, as amended by petition submitted November 16, 19?, includes all of Calaveras, Tuolumne, Stanislaus, San Joaquin and Contra Costa Counties along with the remainder of the CVP service area in San Joaquin and Santa Clara Valleys. The portions of this area which will actually be served with water have not been more specifically identified. The Bureau's economic analysis of the project assumes that some water will be used in the Kaweah River area within the San Joaquin Valley (Staff Exh. 12, p. 8). This would require the construction of conveyance facilities that have not as yet been authorized by Congress. The act of Congress authorizing the project requires that the Stanislaus River basin be given preference in the use of project water.

The project will provide flood protection to approximately 35,000 acres of highly developed agricultural land in the flood plain of the Stanislaus River and to the suburban areas of Ripon, Oakdale and Riverbank. In conjunction with other works it will provide flood protection to agricultural lands along the San Joaquin River and to agricultural lands within the Sacramento-San Joaquin Delta and to suburban areas south of the City of Stockton (RT 25).

The project also will provide water for water quality control and fish and wildlife preservation and enhancement along the Stanislaus River, lower San Joaquin River and possibly provide additional water for water quality control in the Delta (RT 27). Under the terms of an agreement with the California Regional Water Quality Control Board, Central Valley Region, the Bureau has agreed to release up to 70,000 acre-feet of the annual conservation yield of the reservoir to meet water quality objectives.

The project will have power facilities installed immediately below the dam which will consist of two 150 megawatt generators.

Protests to Applications

3. Protests to the applications were filed by numerous individuals, companies, reclamation districts, irrigation districts and other public agencies. Most of the protestants now have no objection to the project and some of the original protestants actually support it. Their principal concern is in the

manner in which the project will be operated, particularly in respect to protection of downstream rights, meeting water quality objectives, location of the areas to be served by the project and the purposes for which the water will be used.

Protestants Oakdale and South San Joaquin Irrigation Districts, Tuolumne County Water District No. 2 and Calaveras County Water District have withdrawn their protests to the applications following agreement with the Bureau (USBR Exh. 37; TCWD No. 2 Exh. 1). Any permits issued pursuant to subject applications should be made subject to these agreements.

Protestants Contra Costa County Water Agency, et al in their brief persist in the position taken during the hearing that Board action on the subject applications should be held in abeyance until the Bureau agrees to abide by any permit terms that may be contained in any permits issued pursuant to the applications. A motion to this effect made during the hearing was properly denied.

Protestants Delta Water Agency, Delta Water Users Association, San Joaquin County Flood Control and Water Conservation District, Banta Carbona Irrigation District, Stanislaus River Flood Control Association, Stockton-East Water District and McMullin Reclamation District, et al support the New Melones Project and are in substantial agreement as to special terms to be included in any permits that may be issued. Requested special permit terms are: a term limiting the entire yield of the project to use in Calaveras, Tuolumne, Stanislaus and San Joaquin Counties;

terms imposing more stringent standards for the protection of water quality in the lower San Joaquin River and Delta for an interim period, the Board retaining jurisdiction in the matter; a term retaining jurisdiction by the Board over fishery flows; a term retaining jurisdiction by the Board in respect to points of rediversion; and a term subjecting the permits to vested rights (a standard permit term). Also requested to be included is a term that would insure that landowners downstream from the dam will receive the flood control benefits for which the project was authorized and a term requiring the Bureau to promptly negotiate with users of water from the Stanislaus River concerning protection of their existing water rights, with the Board reserving jurisdiction over any permits until it does so; however, these are matters not within the Board's authority. Any permits issued will be subject to all prior rights and will not authorize any interference with such rights.

Protestant Department of Fish and Game has recommended greater releases of water for fishlife than those proposed by the Bureau. It also recommends the acquisition of the remaining riparian habitat along the lower portion of the Stanislaus River for the protection of wildlife; that steps be taken to mitigate destruction of wildlife within the reservoir area; and that the Board retain continuing jurisdiction in the matter of fish releases until further information is obtained (F & G Brief, p. 6).

Protestant Environmental Defense Fund contends the Bureau has failed to justify a project of the magnitude planned

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and has failed to show that the water will be placed to beneficial use within a reasonable time. It recommends that the applications and petition for assignment of State filings be denied, particularly in view of the adverse effect the project will have on the environment of the area and on whitewater boating.

Protestant Sierra Club contends that there is no water available from the Stanislaus River and lower San Joaquin River for the out-of-basin uses as contemplated by the Bureau, and that the Bureau is not in a position to place the water covered by the permits to beneficial use within a reasonable period of time. It also recommends that the applications and petition for assignment of State filings be denied.

Water Supply

4. The watershed of the Stanislaus River above the proposed New Melones Dam varies in elevation from 1,088 feet to over 10,000 feet at the crest of the Sierra Nevada. The total drainage area is approximately 900 square miles. The annual rainfall averages approximately 27 inches at the damsite and 65 inches in the upper portion of the watershed.

The estimated unimpaired annual flow in the Stanislaus River at Melones Dam has been as low as 261,000 acre-feet and as high as 2,356,900 acre-feet (USBR Exh. 27). The average annual unimpaired flow is approximately 1,100,000 acre-feet (Staff Exh. 12, p. 34).

Oakdale and South San Joaquin Irrigation Districts divert most of the flow of the Stanislaus River other than flood

flows into their main canals at Goodwin Dam approximately 12 miles downstream from New Melones. As a result, the river is frequently dry immediately below Goodwin Dam during the summer months.

Water Requirements of Users Holding Prior Rights

5. Oakdale and South San Joaquin Irrigation Districts are the major holders of prior rights to the water from Stanislaus River. They constructed the present Melones Reservoir approximately 45 years ago and in 1957 they completed Tulloch, Donnells and Beardsley Reservoirs known as the Tri-Dam Project. Donnells and Beardsley Reservoirs are on the upper middle fork of the Stanislaus River and Tulloch Reservoir is located on the main stem of the river several miles below Melones Reservoir. The total capacity of the three reservoir is 230,400 acre-feet. During the period of 1914-1970 the districts' diversions of water from the Stanislaus River under all claims of right have varied from approximately 204,000 acre-feet in 1924 to a high of 597,300 acre-feet in 1962 with an average annual diversion of 409,500 acre-feet. Under the agreement providing for the dismissal of the districts' protests, the Bureau will deliver all of the inflow of the New Melones Reservoir up to 654,000 acre-feet in each year for rediversion at Goodwin Dam in satisfaction of the districts' prior rights.

The ultimate annual demand for Stanislaus River water below Goodwin Dam has been calculated to be 74,500 acre-feet under active and dormant riparian rights, appropriative rights including all applications on file with the Board as of the

year 1972, and approximately 9,000 afa for undefined "other rights" (USBR Exhs. 33, 34). All of these uses are by direct diversion with a season that generally extends from March through October (USBR Exh. 19). The Bureau's proposed project could not harm these users during the July through October period as no water is available for the project during that period. Accretions to the river between Goodwin Dam and its mouth will be sufficient to cover rights in that area during the March through June period. A comparison of the records of a gaging station just below Goodwin Dam with a station near the mouth of the river for the months of March through June during the period 1963-1968 indicates an average accretion of 47,440 af (USBR Exhs. 12 and 15). The estimated average ultimate annual requirements of the downstream users during March through June is 35,118 acre-feet. (USBR Exh. 31).

The Stanislaus River watershed upstream from the site of the New Melones Dam includes portions of Alpine, Tuolumne and Calaveras Counties. Use of water from the Stanislaus River in Alpine County is mostly on U. S. Forest Service land and the anticipated demand for water in the county is included in a 2,000 afa allocation by the Bureau for use in the Stanislaus National Forest. Calaveras County Water District holds numerous permits to appropriate water for the development of the Stanislaus River basin. Tuolumne County Water District No. 2 also has undeveloped rights to water in the upper Stanislaus basin. The Bureau has estimated the actual yield of the upstream rights of both counties to be 312,000 afa by storage and 1,739 cfs by

direct diversion (USBR Exh. 31; RT 64). The agreements between the Bureau and Calaveras County, Calaveras County Water District and Tuolumne County Water District No. 2 provide that the Bureau will recognize the prior rights of the counties of origin to divert water from the upper basin as required for their needs. Provision is also made for the counties to contract for a water supply from the yield of New Melones (CC Exh. 1; TCWD Exh. 1).

Availability of Unappropriated Water

6. The Bureau's conclusion as to the extent that water in the Stanislaus River remains unappropriated is based upon its estimate of the unimpaired inflow to the New Melones site for a hydrologic cycle equivalent to the period 1923 through 1953. After deducting the quantity of water necessary for the above-described demands the annual average surplus is an estimated 335,000 acre-feet and varies from zero which occurs in nine years of the period of study to 1,980,000 acre-feet.

The Bureau's Exhibit 32a shows no unappropriated water during the month of October and that month should be eliminated from the diversion season specified in any permits to be issued. Diversion during the months of July through September is precluded by past decisions of the Board, and should also be excluded from the permits.

Unappropriated water is available to supply the Bureau, and, subject to suitable conditions, such water may be diverted and used in the manner proposed without causing any substantial injury to any lawful user of water.

Water Quality

7. The Stanislaus River contributes approximately 25 percent of the annual flow of the San Joaquin River as measured at the USGS gaging station "at Vernalis" and approximately [illegible] percent of the July through October flow (USBR Exh. 45). The gaging station is just below the confluence of the two rivers. Most of the summer flow in the lower San Joaquin River consists of irrigation return water. The total dissolved solids (TDS) exceed 500 parts per million (ppm) approximately 38 percent of the time during the irrigation season (USBR Exh. 42; RT 235). The Stanislaus River is an important source of dilution water required to reduce the TDS in the lower San Joaquin River to usable levels (Staff Exh. 11, pp. 13, 15, 27).

The Bureau under its agreement with the California Regional Water Quality Control Board, Central Valley Region, plans to release up to 70,000 acre-feet of water in any one year as required to maintain a mean monthly TDS concentration in the San Joaquin River below the mouth of the Stanislaus River at 500 ppm maximum, also to maintain at least five ppm of dissolved oxygen (DO) in the Stanislaus River (Staff Exh. 13). The Bureau estimates that the DO requirement can be met in 10 out of 11 years, assuming a 1975 level of development, with a water quality release averaging 15,520 afa. These releases will be in addition to the Bureau's planned fish releases which amount to 98,000 acre-feet in a normal year. Releases required to meet these water quality objectives would not exceed 70,000 acre-feet maximum until about year 2075 according to a report written by the U. S. Public Health Service (Staff Exh. 11, Table A-4, p. A-12).

However, the ability of the agreed-upon releases to accomplish the water quality objectives depends upon the assumption that the mean TDS concentration of water released from New Melones will be 50 ppm and that the relationship between flows and TDS at Vernalis established by the U. S. Public Health Service (Staff Exh. 11) will continue. These assumptions may not be valid. TDS levels up to 175 ppm have been recorded prior to the construction of the Tri-Dam Project. Also, evaporation at New Melones Reservoir and return flows from future developments upstream could increase salt levels. Only meager data has been presented by the Bureau concerning the flow versus TDS concentrations in the earlier years. There is little basis for concluding that the flow versus TDS relationship at Vernalis is stable on a long-term basis. Also, a problem in predicting the effect of releases of project water on water quality is the failure of the Bureau to specifically designate the place and method of using the conservation yield of the project.

There was considerable evidence presented at the hearing as to what are proper water quality objectives. The Department of Fish and Game has requested a minimum DO of 7 ppm to protect the salmon fishery (RT 526). The Board's Interim Water Quality Control Plan, San Joaquin Basin 5C, specifies that as a result of waste discharges the DO in the Stanislaus River should not fall below 85 percent of the saturation value, which is more restrictive than the DO standard of 5 ppm agreed upon by the Bureau. Protestants Delta Water Agency and Banta-Carbona

Irrigation District recommend that the maximum total dissolved solids at Vernalis be 450 ppm at a 14-day running average (RT 911). If these objectives had been met during the years 1950 through 1969 the Bureau's proposed limit of 70,000 afa would have been exceeded in ten out of the twenty years. (DWA Exh. 24).

In view of the uncertainty inherent in the problem of proper releases to protect water quality, any permits issued pursuant to subject applications should contain an interim term until further studies are made requiring releases of conserved water from New Melones which will maintain a mean monthly TDS concentration in the San Joaquin River at Vernalis of 500 ppm or less and a DO concentration in the Stanislaus River as specified in the Interim Water Quality Control Plan. The Board should reserve jurisdiction over the permits for the purpose of revising water release requirements for water quality objectives.

Consumptive Use of Project Water

8. The Bureau has described the following areas within which the conservation yield of the New Melones Project may be used for irrigation or other consumptive purposes; the local service area consisting of Tuolumne, Calaveras, San Joaquin and Stanislaus Counties; southern San Joaquin Valley via the proposed East Side Canal or a Cross Valley Canal; San Felipe division of the CVP; San Luis unit of the CVP; the area served by the Delta Mendota Canal; the Montezuma Hills Unit of the CVP; and the Suisun Marsh area.

The entire service area which the Bureau has designated as the place of use includes over 11,000,000 acres of land.

There is a future need for additional water supplies in one or more of the above areas. However, the Bureau has presented no specific plan for applying project water to beneficial use for consumptive purposes at any particular location. Furthermore, the record shows that the CVP has substantial quantities of water that are not being used and are not under contract. The Bureau's own records indicate that without the yield of the New Melones Reservoir the Bureau can meet the estimated buildup of demands under present contracts for a long period of years (USBR Exh. 46 with supplements).

While the Bureau may not be "up to its ears in water" as suggested by Protestant Environmental Defense Fund (EDF Brief, p.5), there certainly has been no demonstrated need for the additional water supplies developed by this project, outside of the local area. Two aspects of this part of the Bureau's case as to the need for water are disturbing; although this decision is in no way dependent upon the information in question, our concerns will be mentioned.

The effort of the Bureau to obfuscate the effect on the applicant of this Board's Decision 1379 is one of them. The Bureau has stated that its share of the additional Delta outflow required to meet the requirements of Decision 1379 would be 2.2 million afa (RT 186). It has also stated that this amount would be reduced to 1.6 million afa with the Peripheral Canal only, and 1.1 million afa with both the Peripheral Canal and Delta Overland Facilities (USBR Exh. 46). It is our understanding that export of water from the Delta during minimum flow periods in the full amount

contemplated by the State and Federal Projects cannot be accomplished without the Peripheral Canal or equivalent facilities (DWR Exh. 502; Staff Exh. 502B, Delta Hearing). Therefore, the significance of the oft-mentioned 2.2 million afa is not apparent.

We are also concerned that the increase in uncommitted yield of the CVP, due to less than expected demand of Sacramento River users, was disclosed more or less as extraneous information, rather than as an integral part of the planning data (RT 745 et. seq.).

By failing to present evidence of a specific plan to use the water conserved by the New Melones Project for consumptive purposes, the Bureau has failed in spirit if not in substance to meet the statutory requirements for approval of a permit to appropriate water for such purposes. While this Board, in the past, has consistently recognized the need to operate facilities of the Central Valley Project in an integrated manner (see Decisions 893, 990, 1356), the law requires the Board to examine each application and determine that the water to be appropriated will be placed to beneficial use (Water Code Sec. 1240). In addition, the specific intended use must be evaluated and found to be reasonable, beneficial and in the public interest before a permit can issue. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion (Water Code Sec. 1257, Temescal Water Co. v. Dept. of Public Works, 44 Cal. 2d 90, 280 P. 2d 1).

The record contains substantial evidence that the full conservation yield of the New Melones Project, and more, will eventually be needed in Tuolumne, Calaveras, San Joaquin and Stanislaus Counties (RT 145-147, 1131). These four counties include substantial areas in the Stanislaus River basin and are considered by the Bureau to be entitled to preference in the use of project water based on the provisions of Public Law 87-874 and the California County of Origin Law (Water Code Sec. 10505) (RT 144). The Board agrees, as explained later in this decision.

The limited unappropriated water resource of the State should not be committed to an applicant in the absence of a showing of his actual need for the water within a reasonable time in the future. When the evidence indicates, as it does here, that an applicant already has a right to sufficient water to meet his needs for beneficial use within the foreseeable future, rights to additional water should be withheld and that water should be reserved for other beneficial uses. In this case, existing surplus supplies that are available to the Bureau should be utilized before storage is allowed in New Melones Reservoir to satisfy demand for more water in service areas outside of the four basin counties.

Although the full conservation yield of the project will be required for future development of the four basin counties, no facilities have been planned up to now to serve

project water in these counties and no contracts have been negotiated for such service. The record is not clear how soon water user agencies will be ready to execute any such contracts.

The lack of evidence that New Melones project water will be needed for consumptive use outside the four basin counties for many years to come, if ever, or that it will be used within those counties at any definite time in the future, raises substantial doubt whether permits should be issued to impound more water in New Melones Reservoir, at least at this time, than is needed for satisfaction of prior rights and non-consumptive purposes - protection and enhancement of fish and wildlife, water quality, recreation and generation of power.*

To help resolve this doubt the Board must consider any adverse consequences of such impoundment. The proposed reservoir would inundate approximately 13 miles of river upstream from the existing Melones Reservoir, including approximately 9 miles above Parrotts Ferry Bridge now being used for whitewater recreation. Any storage of water above the levels of the existing Melones Reservoir will conflict with use of the upper reach for whitewater boating, stream fishing, and other stream-related activities.

Protestant Environmental Defense Fund estimates that in the year 1971 use of the river for whitewater recreation amounted to over 23,000 visitor days and that such use may eventually increase to 90,000 visitor days per year (EDF Exh. 1; RT 1059). It has been estimated that visitors using the services

*Permits to impound water for flood control are not required and were not requested.

of commercial river runners spent approximately $730,500 in 1971. The project's recreational features would not adequately substitute for the present recreational uses of the river in the upstream reach. A study by the Water Resources Council indicates that the New Melones site does not lie within one of the regions which will require additional reservoir recreation areas by the year 2020 (EDF Exh. 7). There are numerous other reservoirs already in the same region (EDF Exh. 6); further, a lake fishery is not adequate replacement for a stream fishery, insofar as many users are concerned. While stream fishing downstream from the reservoir would be enhanced, it would be practically eliminated in the area to be inundated, together with other stream-related activities and wildlife habitat. Although there would still be opportunity for stream-related activities above Camp Nine, that area is less accessible and would not readily absorb users displaced from the lower reach.

In view of the preponderance of the adverse consequences of maintaining a reservoir of the size proposed by the Bureau, the public interest requires that any permits issued pursuant to Applications 14858 and 19304 prohibit the impoundment of water in New Melones Reservoir for consumptive purposes until further order of the Board following a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such purposes.

Because of the lack of a showing of need for water from the New Melones Project outside the counties of Calaveras, Tuolumne, Stanislaus and San Joaquin, the permits should restrict the place of use of water for consumptive purposes to those counties, but should provide that a petition to include other specific areas will be considered by the Board upon a showing that water from other CVP sources is not available to serve such areas. The permits should further provide that any use of water for consumptive purposes outside the four basin counties shall be subordinate to beneficial use within said counties and shall terminate when contracts are executed and the water is needed within said counties. Such a provision is necessary to conform to the preference given to use within the Stanislaus River Basin by the authorizing act of Congress (P.L. 87-874), and a similar preference given to the counties of origin and to the watershed of origin and areas immediately adjacent thereto by state law (see Water Code Secs. 10505 and 11460).

Even without storage of water for consumptive use, a substantial part of the 9-mile reach of river channel above Parrotts Ferry Bridge will be inundated at times. A reservoir of 1,100,000 acre-feet, the approximate size estimated to be required to provide for prior rights, flood control, and for water for the previously discussed non-consumptive uses, would inundate all but the upper few miles of this reach. However, 450,000 acre-feet of the 1,100,000 acre-feet is required for flood control. There would be parts of all years, and some entire years, when the flood space would be empty. With the flood space empty, only about 2½ miles of the nine-mile reach would be inundated. Further drawdown into the conservation storage range, which would be the usual summer

occurrence, would make even more of the whitewater reach available.

It is apparent that intermittent inundation of the whitewater reach would degrade the appearance of the stream to some extent. However, it should not be necessary to maintain high water levels for long periods. The canyon is steep sided and extensive mud flats should not form. On the whole, degradation of the esthetic values is expected to be minimal.

Releases of Project Water for Preservation and Enhancement of Fishlife

7. Applications 14858 and 19304 list "fish culture" as a purpose. The Bureau proposes to release water from New Melones Reservoir for the preservation and enhancement of fishlife, rather than actually engaging in the raising of fish, and the permits should be issued accordingly.

The value of the Stanislaus River as a salmon fishery resource has been estimated to be $300,000 per year (RT 52).

Revised Department of Fish and Game recommendations now call for releases of 262,000 afa from New Melones Reservoir for preservation and enhancement of the fishery in the Stanislaus River and an additional 50,000 afa for the same purposes in the Delta, in a normal year. The drastic revision upward is due, in part, to a belief on the part of the Department that it is the ability of the spring flows to flush juvenile salmon to the ocean which determines the success of the spawning run two and one-half years later when the same salmon return to the river.

There are a number of factors besides flows which affect the salmon run in the Stanislaus River. Further study of the matter is needed, which should include such factors as the feasibility of providing a fish hatchery instead of large river flows.

Any permits issued pursuant to Applications 14858 and 19304 should contain terms requiring the release of up to 18,000 afa for maintenance of fish and wildlife as planned by the Bureau, to be released at a rate and during periods specified by the Department of Fish and Game. Jurisdiction should be reserved by the Board to later revise the releases for preservation and enhancement of fish and wildlife upon reviewing the results of further studies, as mentioned above. Such studies were proposed by the Bureau and agreed to by the Department of Fish and Game. The joint investigation should include an attempt to determine the optimum balance between maximizing fish and wildlife benefits while minimizing reservoir storage levels, during the period prior to storage of water for consumptive uses.

Dry Year Criteria

10. Formal dry year criteria for the benefit of consumptive uses will not be specified at this time since the Board is making no allocation of water for irrigation, domestic, municipal and industrial uses. However, the Board will reserve jurisdiction until the conservation yield is fully allocated to provide such dry year criteria as appear warranted after further hearing.

Hydroelectric Power Development

11. Inasmuch as there is considerable question as to the need for appropriation of water in the proposed quantities for purposes other than the generation of power, it is necessary to determine if the project's power benefit alone justifies storage in addition to that presently needed for other purposes.

Previous mention has been made of the fact that any increase in storage conflicts with use of the upper river for whitewater recreation, stream fishing and wildlife. If as the demand for water for consumptive uses increases and storage for those uses is authorized, storage for power purposes will also be considered. The immediate question, therefore, is whether the need for maintaining the present regimen of the stream outweighs the need for an additional increment of generating capacity during the interim period.

The Bureau calculates the annual benefits of the power function of the proposed project to be over five and one-half million dollars. Restriction of storage for power purposes to the amount required for satisfaction of prior rights and flood control plus the amoun allowed for fish and wildlife and water quality control would reduce the capacity of the powerplant from 300 megawatts, with an annual electrical energy production of 430,000 megawatt-hours, to some lesser but undetermined production. The opportunity to contribute to the solution of the present power supply problems should not be overlooked. However, the project was not proposed as a means of alleviating the power shortage and the Bureau did not offer evidence to show that full approval of its power applications would decrease the need for development of other sources of power.

Although maintenance of the upstream reach of the river in its present state solely for recreational uses cannot be justified strictly on an economic basis. The recreational uses in question have a value beyond that described by dollar resources only.

Opportunities for lake fishing are relatively abundant in California and stream fishing does not appear to be critically lacking. However, the tendency of increased levels of development is to replace stream fisheries with lakes. Therefore, when a choice must be made between two alternates which will result in different types of fisheries, extra weight should be attached to the value of a stream fishery.

The situation with respect to whitewater boating is analagous to that of the fisheries. While the opportunities for flat water boating are abundant, streams suitable for whitewater boating are extremely scarce (RT 1061); also, the Stanislaus may be the second most heavily used river in the nation for that purpose in actual number of visitors per year (RT 1061). In fact, the Bureau has contended that overuse of the river may become a problem.

If the Bureau eventually substantiates the need for storage for consumptive use purposes out-of-basin (such as in the San Luis service area), large quantities of power will be required to deliver the water. At such time, development of the full power potential of New Melones should be considered to offset the increased pumping demand insofar as possible. In the meantime, any power developed at New Melones in excess of the losses in production expected at the existing Melones and Tulloch Powerhouses will be a net gain to the pool of available power. If substantial basin exports are allowed in the future, the balance may shift to a net loss, even with increased production at New Melones.

In view of the foregoing, the Board finds that the reach of river in question is a unique asset to the state and the nation. Until the need for water for consumptive purposes dictates approval of increased storage, the public interest requires that storage for power purposes also be kept at reduced levels. Permits issued pursuant to Applications 14859 and 19303 for power purposes should be limited to the amount of conservation storage authorized under the permits issued pursuant to Applications 14858 and 19304. Direct diversion under Applications 14859 and 19303 for power purposes should be limited to 6,000 cfs which will be the capacity of the proposed penstocks.

Assignment of State Applications 14859 and 14859 Held by the Board

12. The Board may assign any applications filed in accordance with Water Code Section 10500 and held by the Board when the assignment is for the purpose of development not in conflict with a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State or with water quality objectives established pursuant to law (Water Code Sec. 10504). Further, no such assignment shall be made that will deprive the county in which the water covered by the application originates of any such water necessary for the development of the county (Water Code Sec. 10505).

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The Bureau's project is not in conflict with any such general plan looking toward the development, utilization or conservation of the water resources of the State or with water quality objectives. The California Water Plan provides for the enlargement of existing Melones Reservoir to the capacity of 1,100,000 acre-feet (DWR Bulletin 3, p. 130). The use of a portion of the conservation yield of New Melones Reservoir for water quality control is in keeping with water quality objectives for the lower San Joaquin River. Assignment of the applications should be subject, in conformity with Section 10505 of the Water Code, to any and all rights of any county in which the water sought to be appropriated originates to the extent that any such water may be necessary for the development of such county. As so conditioned, the assignment will not deprive any such county of any water necessary for its development. Any permits issued pursuant to the applications should contain a similar term.

The counties of origin are further protected by Public Law 87-874. It provides that the needs of the Stanislaus River basin have priority in allocating project water.

The Board's Jurisdiction

13. The regional solicitor, who is the Bureau's legal representative in this proceeding, reiterates the official position that has been advanced by him in previous proceedings before this Board, that we have no jurisdiction to impose any conditions or limitations upon the Bureau's permits. He argues that the Board's function is "ministerial"; that having determined that unappropriated water exists, a permit for the unappropriated water then follows "as a matter of course" (USBR Opening Brief, p. 10).

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Such an interpretation of the Board's authority is not supported by either statutory or case law and is not even consistent with other portions of the solicitor's brief or with the Bureau's conduct with respect to previous applications that have been acted upon by the Board and its predecessors. The solicitor himself proposes a special permit term requiring the Bureau to conduct certain studies related to the fishery in the Stanislaus River (USBR Opening Brief, p. 3).

Rather than an extended legal discussion at this time we feel it is sufficient to reaffirm the views expressed in previous decisions concerning the need for the Bureau to comply with state law when it applies to the state for a right to appropriate water of the state. See Decision 990 approving applications of the Bureau for the CVP and Decision 1379 exercising jurisdiction reserved in Decision 990.

Summary

There is unappropriated water available to satisfy the demands of the project as proposed. However, the Bureau has no definite plan as to when or at what specific locations project water will be used for consumptive purposes outside the four basin counties, and it has sufficient surplus water from other sources to meet future increased demands outside these counties for a long period of years. Permits should not be issued for use of water outside these counties at this time.

The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wildlife habitat be protected to the extent that water is not needed for

other beneficial uses. Therefore, although there is a demonstrated need for the full yield of the project in the four basin counties at some time in the future, but for which no contracts have been negotiated, and in view of the adverse effect the proposed reservoir will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantiated.

Appropriations by storage should be allowed of sufficient water to provide for the preservation and enhancement of fishlife up to 98,000 afa. Storage should also be allowed to meet TDS objectives of 500 ppm and DO objectives as required by the Interim Water Quality Control Plan. The Board should retain jurisdiction for the purpose of conforming the permits to demonstrated needs for water for such purposes. Storage of water should also be allowed to replace water stored in the existing Malones Reservoir which will be inundated. The season of diversion to storage should conform to the availability of unappropriated water; namely, November through June.

Beneficial use of project water can be made for the generation of power. However, preservation of the existing upstream reach of the river for recreation values conflicts with increased storage for power purposes. Therefore, storage for power generation should be approved, but limited to the amount authorized for other project purposes.

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By dedicating the initial project yield to demonstrated needs for flows for water quality control and for fish and wildlife preservation and enhancement and allowing use of these flows for power generation, and by deferring significant impairment of upstream recreational values until a need for other uses is demonstrated, the Board's decision assures the maximum public benefit and maximum utilization of the available resources in the public interest.

From the foregoing findings, the Board concludes that Applications 14858 and 14859 should be assigned to the Bureau; that they and Applications 19303 and 19304 should be approved in part and that permits should be issued to the Bureau subject to the limitations and conditions set forth in the order following:

ORDER

IT IS HEREBY ORDERED that Applications 14858 and 14859 be, and they are, assigned to the United States Bureau of Reclamation, subject, in conformity with Section 10505 of the Water Code, to any and all rights of any county in which the water sought to be appropriated originates to the extent that any such water may be necessary for the development of such county.

IT IS FURTHER ORDERED that Applications 14858, 14859, 19303 and 19304 be approved in part, and that permits be issued to the United States Bureau of Reclamation subject to the following conditions and limitations:

1-a. The water appropriated under the permit issued pursuant to Application 14858 shall be limited to the quantity which can be beneficially used and shall not exceed 980,000 acre-feet per annum by storage to be collected from November 1 of each year to June 30 of the succeeding year. Until further order of the State Water Resources Control Board, the water shall be used only for preservation and enhancement of fish and wildlife, recreation and water quality control purposes.

1-b. The water appropriated under the permit issued pursuant to Application 14859 shall be limited to the quantity which can be beneficially used and shall not exceed 6,000 cubic feet per second by direct diversion to be diverted from January 1 to December 31 of each year and 980,000 acre-feet per annum by storage to be collected from November 1 of each year to June 30 of the succeeding year to be used for power purposes.

1-c. The water appropriated under the permit issued pursuant to Application 19303 shall be limited to the quantity which can be beneficially used and shall not exceed 1,420,000 acre-feet per annum to be collected from November 1 of each year to June 30 of the succeeding year to be used for power purposes.

1-d. The water appropriated under the permit issued pursuant to Application 19304 shall be limited to the quantity which can be beneficially used and shall not exceed 1,420,000 acre-feet per annum by storage to be collected from November 1 of each year to June 30 of the succeeding year. Until further order of the State Water Resources Control Board, the water shall be used only for preservation and enhancement of fish and wildlife, recreation and water quality control purposes.

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2. Until further order of the Board, permittee shall impound in New Melones Reservoir only such water as is necessary to provide (a) not in excess of 98,000 acre-feet per annum for the preservation and enhancement of fish and wildlife to be released at a rate specified by the California Department of Fish and Game, plus (b) such additional water as is necessary to maintain the water quality conditions set forth in paragraph 5. The above amounts are in addition to water stored for satisfaction of prior rights at existing Melones Reservoir and for flood control. No additional impoundment shall be allowed for power and recreational purposes. Further order of the Board shall be preceded by a showing that the benefits that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones [illegible] and that the permittee has firm commitments to deliver water for such other purposes. The Board reserves jurisdiction for the purpose of establishing dry year criteria at the time such impoundment is approved.

3. Before any water is impounded in New Melones Reservoir, permittee shall file with the Board a reservoir operation study showing the water level elevations required to provide the yield specified in paragraph 2. The study shall include details of the permittee's proposed reservoir clearing plan to show the manner in which clearing will progress as additional storage is authorized. A reservoir operation schedule

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shall be submitted by the permittee which shall be subject to approval of the Board. The study shall be updated at least once every five years until further order of the Board.

4. Permits issued pursuant to Applications 14858 and 19304 shall authorize the use of water for consumptive purposes only in the counties of Stanislaus, Calaveras, Tuolumne and San Joaquin. A petition to amend the permits to include other specific areas will be considered by the Board upon a showing that water from other CVP sources is not available to serve such areas. Any use of water for consumptive purposes outside the counties of Stanislaus, Calaveras, Tuolumne and San Joaquin that may be authorized later shall be subordinate to beneficial use within said counties and shall terminate when contracts are executed and the water is needed for beneficial use within said counties.

5. Releases of conserved water from New Melones Reservoir for water quality control purposes shall be scheduled so as to maintain a mean monthly total dissolved solids concentration in the San Joaquin River at Vernalis of 500 parts per million or less and a dissolved oxygen concentration in the Stanislaus River as specified in the Water Quality Control Plan (Interim), San Joaquin River Basin 5C, State Water Resources Control Board, June 1971.

In the event that the Water Quality Control Plan (Interim) is amended or superseded, the foregoing water quality objectives shall be modified to conform to then current criteria.

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6. The State Water Resources Control Board reserves jurisdiction over these permits for the purpose of revising water release requirements for water quality objectives and fish releases and for establishing dry year criteria pursuant to studies to be conducted by the permittee and other parties in an effort to better define water needs.

7. Permittee shall file with the Board at least biennially a report of water diversions and use along the Stanislaus River and San Joaquin River between New Melones Dam and the Vernalis gage which will show any increased diversions subsequent to the beginning of releases of water under this permit, which diversions may be encroaching on the water supply provided for preservation and enhancement of fish and wildlife and for water quality control, and will show what steps, if any, permittee is taking to prevent any such encroachment.

8. Permittee shall file with the Board an annual report showing (a) daily storage level in New Melones Reservoir, (b) daily record of total dissolved solids at Vernalis, and (c) daily record of minimum dissolved oxygen level for the day at Ripon or at an alternate location approved by the Board.

9. The maximum quantities stated herein may be reduced in the license if investigation warrants.

10. Construction work shall be completed on or before December 1, 1980.

11. Complete application of water to the uses authorized by the permit shall be made on or before December 1, 1990.

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12. Progress reports shall be submitted promptly by permittee when requested by the State Water Resources Control Board until license is issued.

13. All rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

This continuing authority of the Board may be exercised by imposing specific requirements over and above those contained in this permit with a view to minimizing waste of water and to meeting the reasonable water requirements of permittee without unreasonable draft on the source. Permittee may be required to implement such programs as (1) reusing or reclaiming the water allocated; (2) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (3) suppressing evaporation losses from water surfaces; (4) controlling phreatophytic growth; and (5) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this permit and to determine accurately water use as against reasonable water requirements for the authorized project. No action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.

RECYCLED PAPER

14. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.

15. Permittee shall allow representatives of the State Water Resources Control Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

16. In compliance with Section 5946 of the Fish and Game Code, permittee shall accord to the public, for the purpose of fishing, reasonable right of access to the waters impounded by the dam under this permit during the open season for the taking of fish subject to the regulations of the Fish and Game Commission.

17. Permittee shall install and maintain an outlet pipe of adequate capacity in his dam as near as practicable to the bottom of the natural stream channel, or provide other means satisfactory to the State Water Resources Control Board, in order that water entering the reservoir which is not authorized for appropriation under this permit may be released.

18. In accordance with the requirements of Water Code Section 1393, permittee shall clear the site of the reservoir of all structures, trees, and other vegetation which would interfere with the use of the reservoir for water storage and recreational purposes. This provision, however, shall not preclude the permittee from retaining vegetation cover in selected areas as required for the protection of wildlife. Clearing operations shall be coordinated with authorized increases in storage levels.

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19. Rights under this permit are, and shall be, subject to existing rights determined by the Stanislaus River Adjudication Decree of Superior Court of San Joaquin County dated November 14, 1929, Action No. 16873 with Supplemental Decrees dated February 24, 1930; March 8, 1934; May 8, 1935 and November 29, 1960, insofar as said adjudicated rights are maintained, and such other rights as may presently exist.

20. The quantity of water diverted under this permit and under any license issued pursuant thereto is subject to modification by the State Water Resources Control Board if, after notice to the permittee and an opportunity for hearing, the Board finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to Division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the Board finds that (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.

21. In order to prevent degradation of the quality of water during and after construction of the project, permittee shall file immediately a report pursuant to Water Code Section 13260 and shall comply with any waste discharge requirements imposed by the California Regional Water Quality Control Board, Central Valley Region, or by the State Water Resources Control Board.

22. Before making any change in the project determined by the State Water Resources Control Board to be substantial, permittee shall submit such change to the Board for its approval in compliance with Water Code Section 10504.5(a).

23. This permit shall be subject to appropriation by storage upstream from New Melones Reservoir for stockwatering and recreational purposes, provided the individual capacities of reservoirs for such purposes do not exceed 10 acre-feet and the reservoirs are kept free of phreatophytes.

24. This permit shall be subject to the following agreements between the permittee and other parties:

(a) The "Agreement and Stipulation" dated October 24, 1972 and executed by the permittee, Oakdale Irrigation District and South San Joaquin Irrigation District.

(b) The agreement between the permittee and Tuolumne County Water District No. 2 dated November 29, 1972.

(c) The agreement dated July 31, 1972 between permittee and Calaveras County Water District.

Reference to the above three agreements shall not be construed as a finding by the State Water Resources Control Board with respect to the rights of any of the parties involved.

25. This permit does not authorize the use of any water outside the counties of origin which is necessary for the development of the counties.

IT IS FURTHER ORDERED that the hearing on this matter will be reconvened not later than July 1, 1986 for the purpose of considering the status of the items of reserved jurisdiction.

Dated:

(BOARD MEMBERS' SIGNATURES)

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1179

ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Petitioners,

vs.

GILBERT STAMM, et al.,
Respondents.

Brief of Respondent-Intervenor Associated General Contractors of California, Inc. in Opposition to Petition for Writ of Certiorari

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Brief of Respondent-Intervenor Associated General Contractors of California, Inc. in Opposition to Petition for Writ of Certiorari

This brief is filed on behalf of Associated General Contractors of California, Inc., which intervened during the proceedings before the District Court for and on behalf of its members, firms which are engaged in the heavy construction business throughout the State of California. This respondent-intervenor was also a responding party defendant on appeal to the United States Court of Appeals for the Ninth Circuit. For purposes of convenience, this respondent-intervenor is hereinafter referred to as "AGC".

QUESTIONS PRESENTED

1. Does the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-47, require a discussion of the need for the project within the environmental impact statement ("EIS") itself, or is that issue within the exclusive province of the authorized decision makers?

2. Is the correct standard which governs judicial review of the adequacy of an EIS that set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)?

3. Does the State Water Resources Control Board Decision 1422 require respondents to file a supplemental EIS, or have all interested parties been adequately advised of that decision?

STATEMENT OF THE CASE

AGC adopts in full the Statement of the Case as set forth in the brief filed with this Court by the local area respondent-intervenors, including the County of Calaveras, et al., the State Building and Construction Trades Council of California and California State Conference of Operating Engineers.

ARGUMENT

I. An EIS Need Not Discuss the Need for a Proposed Project, Nor Is There a Conflict Among the Lower Federal Courts on This Point.

Although petitioners attempt to give some credibility to their argument that the EIS should have evaluated the need for irrigation by clothing that argument in the language of the National Environmental Policy Act, when all the trappings are stripped away the issue is clear. The question is whether a federal agency is required by NEPA to discuss the need for the project within the EIS itself, or whether

the need for the project is a subject within the exclusive province of the authorized decision maker, i.e., Congress.

Petitioners cite cases which they argue support the proposition that an EIS must discuss the need for a project. Even a cursory reading of the cases cited by petitioners reveals that they stand for no such proposition. Thus, petitioners cite the Eighth Circuit case of *EDF v. Froehlke*, 473 F.2d 346, 351 (8th Cir. 1972), which states that "the complete impact study must contain more than a catalog of environmental facts . . . the complete formal impact study represents an *accessible* means for opening up the agency decision making process and subjecting it to critical evaluation by those outside the agency, including the public." Petitioners also cite *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973), for the proposition that an EIS must also "explore and evaluate alternatives in such a way as to permit them to be sensibly compared". (Petition for Writ of Certiorari, p. 18). Further, petitioners cite the guidelines of the Council on Environmental Quality and the legislative history of NEPA for the proposition that alternative actions must be adequately evaluated.

AGC cannot and does not disagree with the propositions set forth in the cited cases, the guidelines, and the legislative history. An EIS should contain "more than a catalog of environmental facts" and should "explore and evaluate alternatives in such a way as to permit them to be sensibly compared". However, this is *not* the same thing as saying that the EIS itself must justify the *need* for the project.

Such a discussion of the need for a project would be presumptuous and directly inapposite to the purposes of NEPA. An opinion as to the need for a propect by such an agency would necessarily mean that the agency would have to make an initial determination of whether or not certain

results are desirable, before it could determine whether or not the project was needed. For instance, increases in population and industrial growth may or may not be desirable results. If the agency decided such results were desirable, the project would be needed. If the agency decided such growth was not desirable, the project would be unneeded. Such an initial determination is obviously beyond the realm of the agency and must be left to the authorized decision maker, i.e., Congress.

A careful reading of the cases in the various Circuits reveals that no lower federal court has held that an EIS must discuss the need for a project. There is, therefore, no conflict among the Circuits on this point as contended by petitioners. Petitioners attempt to argue that such a conflict exists between the Ninth Circuit and the other Circuits by mischaracterizing the holdings in the Ninth Circuit. Thus, petitioners state that the Ninth Circuit "appears to stand alone in taking the view that an EIS which is no more than a catalogue of environmental data is sufficient and that it need not also set forth data of other kinds to permit intelligent reexamination of the agency's decision to proceed". (Petition for Writ of Certiorari, p. 20).

Of course there has been no such holding in any decision by the United States Court of Appeals for the Ninth Circuit. In the instant case the Court of Appeals appears not to have even reached the question, since it recognized the dispute as one over the evaluation of the evidence for the need and said that as to the project's need itself there "was no real conflict". *EDF v. Armstrong*, 487 F.2d 814, 817 (9th Cir. 1973). Even assuming that it did reach the question whether an EIS must discuss the need for a project, there is no such holding as petitioners suggest.

The decision in the Ninth Circuit which most thoroughly discusses the necessary contents of an EIS is *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (9th Cir. 1973), an action brought for judgment declaring that the Secretary of the Interior had failed to comply with NEPA procedures in connection with construction of electric generating facilities. In discussing the role of an appellate court in an environmental impact case, the court said (471 F.2d at 1279-80, emphasis added):

> *At the outset we note that this Court may not substitute its judgment for that of the Secretary of the Interior as to the necessity or desirability of the projects in question.* We are not asked to determine whether present and future power needs of the Southwestern United States should be met by coal-fired energy production nor are we asked to distinguish between power requirements and power demands. *This Court is not to balance the benefits of the development of additional electric power against its adverse effect on the environment. Instead, our scope of review is very narrow. We are limited to the question whether the Secretary's action followed the necessary procedural requirements.*

The Court of Appeals followed *Jicarilla* in its opinion in the instant case when it said (*EDF v. Armstrong*, 487 F.2d 814, 822 n. 13 (9th Cir. 1973):

> We do not read the National Environmental Protection Act to give to the courts the ultimate authority to approve or disapprove construction of a properly authorized project where an adequate EIS has been prepared in accordance with the NEPA requirements . . . We have taken the view that final judgments of project justification are not subject to review in an action to consider the adequacy of an EIS statement under NEPA. [citing *Jicarilla*]. Congress in reauthorizing the project and in determining whether to pro-

ceed in the light of the EIS must consider many other factors in addition to the environmental effects. Those questions are not before us and properly so.

The Ninth Circuit has simply said, and correctly so, that an EIS should be limited to a review of environmental factors and that the ultimate determination of the need for the project should be left to the decision makers. This view is in no way contrary to the view of the other Circuits.

II. There Is No Merit in the Contention That the Court of Appeals Did Not Apply the Appropriate Judicial Standard of Review, Nor Is There a Conflict Among the Lower Federal Courts on This Point.

Petitioners argue that there is a conflict among the lower federal courts as to the correct standard which governs judicial review of the adequacy of environmental impact statements. In an attempt to persuade this Court to grant the petition, petitioners again attempt to create a conflict where no such conflict exists.

For some unexplained reason petitioners devote almost a full page to the discussion of a decision where this Court held that under the Administrative Procedure Act ("APA") the Secretary of Transportation's decision to approve a highway in the exercise of his discretion under the Department of Transportation Act, 49 U.S.C. § 1653(f), was judicially reviewable. Petitioners admit that this case did not arise under NEPA and, therefore, AGC is at a loss to determine its relevancy to the instant case. In any event, the decision adds nothing to petitioners' argument.

Petitioners concede that the "touchstone for judicial review of administrative action [is the Administrative Procedure Act."] (Petition for Writ of Certiorari, p. 22). However, they apparently attempt to argue that a conflict exists

among the lower federal courts because some lower courts have put a "gloss" upon the "bare-boned standards in the APA" which stands in "stark contrast" to the standard of review which the Ninth Circuit has adopted. Not only does AGC fail to see the "stark contrast" between the standard of review adopted by the Ninth Circuit and that adopted by other lower federal courts, AGC fails to recognize that the other lower federal courts have even placed such a "gloss" on the APA standard of review.

Petitioners cite and quote from *Silva v. Lynn*, 482 F.2d 1282, 1284 n. 2 (1st Cir. 1973), in support of their position that such a gloss has been placed on the APA standard of review by the other lower courts. That case and the quotation stand for no such proposition. That quotation relates to a footnote in the case where the court emphasized the word "detailed" as it is used in NEPA requiring a detailed environmental impact statement. (42 U.S.C. § 4332(2)(C)). All the court was saying in dictum is that the EIS must be a "detailed" statement, which connotes a careful, reasoned and fully explained analysis. There is nothing incongruous in requiring a detailed environmental impact statement and then reviewing that detailed statement to determine whether the agency acted arbitrarily or capriciously in its presentation of those details.

Petitioners also cite the case of *EDF v. TVA*, 468 F.2d 1164, 1174-75 (6th Cir. 1972), for the proposition that the Sixth Circuit has placed a gloss upon the APA standard of review not followed by the Ninth Circuit. Again, this is not the case, since the citations to *EDF v. TVA* stand merely for the proposition that agencies are to comply "to the fullest extent possible" with the requirement that a "detailed" statement be provided. Again, there is nothing incongruous in requiring an agency to comply "to the fullest

extent possible" with the requirements that a "detailed" statement be provided, and then applying the "arbitrary and capricious" standard to determine whether that agency has, to the fullest extent possible, complied with the requirement that such a detailed statement be provided.

The appellate courts in several Circuits besides the Ninth Circuit have applied the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), in reviewing the adequacy of environmental impact statements. *Silva v. Lynn*, 482 F.2d 1282, 1283-84 n. 1 (1st Cir. 1973); *EDF v. Corps of Engineers*, 470 F.2d 289, 298 n. 14 (8th Cir. 1972). Thus, no conflict exists among the lower federal courts on the correct standard which governs judicial review of the adequacy of an EIS. Further, the Court of Appeals for the Ninth Circuit correctly applied that standard in the instant case.

III. There Is No Merit in the Contention That the State Water Resources Control Board Decision Requires the Filing of a Supplemental EIS.

Petitioners contend that Decision 1422 of the California State Water Resources Control Board was a new development so significant as to require respondents to file a supplemental EIS before they committed themselves further to the project as presently designed.

AGC contends that Decision 1422 cannot and should not serve as a basis for granting a Writ of Certiorari for the following three reasons, among others:

(1) In the first place, inherent in Decision 1422 is precisely the same issue involved in litigation presently pending in the District Court for the Eastern District of California (see p. 25, n. 14 of Petition for Writ of Certiorari). That issue is the conflict between federal and state authorities

over who has the ultimate power with respect to a diversion of the state's water by federally authorized and funded projects. As the AGC understands the situation, it is the position of the Board that the federal government is the same as every other diverter or user of water and is subject to state authority and must comply with stated conditions in connection with water permits. We understand the federal position to be that no state government or agency may impose any restrictions or conditions upon the agencies of the federal government in connection with congressionally authorized projects. (*EDF v. Armstrong,* 487 F.2d 814, 818 n. 8 (9th Cir. 1973).

Presumably, the District Court of the Eastern District of California will, in due course, issue a decision bearing directly on this intricate federal-state relationship issue. However, and acting on the assumption that the Bureau of Reclamation will not accept the conditions of Decision 1422, for this Court to require the filing of a supplemental EIS because of that decision implies a finding in favor of the state authority as against the federal authority on this important but complex question—a question which has never been briefed or argued in this case in any way, manner, shape, or form.

(2) Petitioners argue that respondents have "put all their eggs in one basket", implying that unless the federal courts uphold their suit challenging the jurisdiction of the Board over the United States, the project must necessarily fail. Such is not the case. The Board specifically recognized that "there is a demonstrated need for the full yield of the project" at some time in the future and stated that the Board "should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when

the need for the water is substantiated." (Decision 1422, p. 27, *Appendix F* to Petition for Writ of Certiorari). The Board clearly envisioned a time in the future when the Bureau of Reclamation would present evidence of a specific plan to use the conservation yield for designated consumptive uses. As that evidence is presented and the specific need for the water is substantiated, the Board would then issue permits approving incremental appropriations for consumptive use up to the full quantity covered by the original applications of the Bureau.

(3) Petitioners criticize the Court of Appeals for failing to give consideration to the three questions raised by the CEQ letter of April 17, 1973. Petitioners imply that the Court of Appeals indicated that it would give "careful consideration" to those questions and then did not do so. Of course, the question which the Court of Appeals set out to consider and did consider was not a response to that letter but rather a response to the CEQ suggestion that a supplemental EIS be prepared and circulated. The Court of Appeals amply considered that suggestion and came to the conclusion that no supplemental EIS was necessary.

As indicated by the Court of Appeals, the purposes of NEPA have been satisfied without the necessity of a supplemental EIS discussing the effects, if any, of Decision 1422. The Court of Appeals noted that the decision makers, the Corps of Engineers, and the Bureau of Reclamation are "fully aware of the order, its effect and its implications." (*EDF v. Armstrong*, 487 F.2d 814, 821 (9th Cir. 1973). Further, that court noted that the Chairman of the CEQ, the author of the April 17 letter referred to by petitioners, has the decision. All interested parties, including most importantly the pertinent decision makers, can, therefore,

consider its implications without the necessity of a supplemental EIS being prepared simply to discuss it.

CONCLUSION

For these reasons AGC respectfully urges that the Petition for Writ of Certiorari in this proceeding should be denied.

Respectfully submitted,

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February 28, 1974

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*Opinion of lower court in this action.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No.

ENVIRONMENTAL DEFENSE FUND, INC., et al.,
Petitioners,

vs.

GILBERT STAMM, et al.,
Respondents.

BRIEF OF RESPONDENT-INTERVENORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This brief is filed on behalf of the following parties who appeared as defendant-intervenors during the proceedings before the District Court and as responding parties defendant on appeal to the United States Court of Appeals for the Ninth Circuit: The County of Calaveras, San Joaquin County Flood Control and Water Conservation District, County of Stanislaus, County of Tuolumne, City of Escalon, City of Riverbank, City of Modesto, City of Oakdale, City of

Ripon, City of Stockton, Salida Sanitary District, Reclamation District 2075, San Joaquin River Water Users Company, Federal Land Bank Association of Modesto, Federal Land Bank Association of Stockton, Stanislaus River Flood Control Association, Del Rio Golf and Country Club, Gerald Barton, Mae Giovanetti, John Hertle, Manuel Macedo, Paul A. Philbin, Raymond Arroquy, Donald R. Fairchild, William Jiminez, Mountain Counties Water Resources Association, State Building and Construction Trades Council of California, and California State Conference of Operating Engineers. The foregoing parties are hereinafter referred to, for convenience, as Respondent-Intervenors.

This action arises under the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. 1431 et seq. (hereinafter referred to as NEPA), which requires the filing of an Environmental Impact Statement (EIS) in connection with any proposed major federal action which will affect the quality of the human environment. The action concerns the proposed New Melones Dam on the Stanislaus River.

The Stanislaus River has a record history of destructive flooding dating back to March, 1907. Since January, 1963, there have been four major floods on the river which, according to estimates of the Corps of Engineers (hereinafter referred to as "Corps"), have resulted in over Six Million ($6,000,000.00) Dollars in damage to property along the river above its mouth, based on 1971 prices. These estimates indicate that the flood of January, 1969, alone would

have resulted in nearly Two and One-Half Million ($2,500,000.00) Dollars in damages, at 1971 prices, above the confluence of the Stanislaus and San Joaquin Rivers. In view of property improvements and increased property values occurring since these floods, recurrence of the same floods today would result in substantially increased damages. Flood flows of the Stanislaus River also cause substantial damage along the San Joaquin River and in the Sacramento-San Joaquin Delta. Estimates by the Corps indicate that damages occurring below the junction of the Stanislaus River with the San Joaquin River which are directly attributable to waters of the Stanislaus River average approximately one and one-half times the damages along the Stanislaus River above its mouth. Thus, based on these estimates and allowing for damage in the Delta and escalation of property values, recurrence of the 1963-1969 floods in the future would produce total damages of over Fifteen Million ($15,000,000.00) Dollars at 1971 prices.

The original New Melones Project was authorized as a flood control project in 1944, Flood Control Act of 1944, 58 Stat. 887. Since that time, as was demonstrated at the trial of this action, substantial demands have developed in the basin for increased flood control, irrigation, fish and wildlife enhancement, power generation, and water quality control. Thus, in 1962 Congress re-authorized a substantially enlarged project which is essentially the present project at the New Melones site, Flood Control Act of 1962, 76 Stat. 1173.

There are presently four major existing dams on the Stanislaus River (Beardsley, Goodwin, existing Melones, and Tulloch) as well as several small reservoirs and a number of Pacific Gas and Electric Company diversion tunnels and power houses. The existing white water reaches of the Stanislaus, which will admittedly be inundated if New Melones Dam is constructed and operated as planned, result in substantial part from releases of stored water from the existing man-made structures on the river.

The planned New Melones Dam is a multi-purpose public works project. In addition to irrigation water, the project will provide flows for fish and wildlife, water quality control, and the generation of hydroelectric power; will provide recreational benefits; and, most importantly, will provide flood control for the residents of the river basin who have suffered repeated losses due to flooding. To bring the project to a halt now will result in the loss, or significant delay in the providing of all of these benefits to the residents of the basin and of the State of California, in general. Respondent-Intervenors are filing this brief in opposition to the granting of a writ of certiorari so that the interests of those who will be most directly affected by the decision may be heard.

Petitioners Environmental Defense Fund (EDF) and Sierra Club (hereinafter collectively referred to as "Petitioners") originally brought suit on June 8, 1972, seeking preliminarily to enjoin further work on the dam on the ground that the EIS filed in connection with the project was inadequate in that it (1) failed

to describe the environmental effects of the use of the new irrigation water to be stored by the dam; (2) failed to describe the whole project because of its failure to discuss a proposed but unauthorized project of which New Melones may become a part; and (3) failed to discuss a variety of alternatives to the proposed structure. The motion for a preliminary injunction and the trial on the merits were consolidated, and the case was then tried on September 27-30 and October 9, 1972.

The District Court issued its first opinion in this matter on November 14, 1972, *Environmental Defense Fund v. Armstrong,* 352 F.Supp. 50 (N.D.Cal. 1972). Viewing the project to be discussed in the EIS as including both the construction and the actual operation of the dam, as urged by the Petitioners, the Court found that the EIS was fully adequate in its treatment of the construction phase of the project and that it was also adequate in its treatment of the operation of the dam, except for the discussion therein of the uses to which the 250,000 to 285,000 acre feet of conservation yield would be put. As to the failure to discuss the uses to which the conservation yield would be put, the Court recognized the difficulty of predicting relative needs ten years into the future (the earliest possible date by which the dam could be filled) but nonetheless ordered the federal defendants to supplement the EIS with a tentative discussion or "best estimate" of the areas of need and of the environmental impacts which would arise from delivery of water to those areas. The court-ordered supplementation was

to proceed in accordance with a schedule proposed by the Court which would permit the letting of the main dam contract and mobilization by the successful low bidder, but which would permit no work to be undertaken at the construction site until after final approval of the revised EIS by the District Court.

On November 28, 1972, the first of two scheduled hearings on the revised EIS was held. At that hearing, the District Court, having studied the draft EIS submitted to it on November 22, 1972, afforded counsel for the Environmental Defense Fund and the Sierra Club an opportunity to comment upon the revised statement, to note any deficiencies therein, and to present to the Court any reasons why the Court should alter either the construction or the supplementation schedules. No such reasons were given at that time by either the EDF or the Sierra Club, but each promised that following careful review of the supplemental data their comments and suggestions would be forthcoming. Following the November 28th hearing, the District Court issued its first Supplemental Memorandum Opinion and Order, in which the court explained that, having been presented with no reason to alter the schedule as initially announced, the parties were to adhere to that schedule.

On November 28th the Court of Appeals for the Ninth Circuit issued a temporary injunction enjoining the federal defendants from certain action concerning the contract for construction of the dam until December 8, 1972. After several continuations, an order was issued on January 18, 1973, continuing the

injunctive relief pending disposition of the Petitioners' appeal. Briefing was scheduled to conform to the District Court's supplementation schedule so as to have a final judgment on the adequacy of the EIS from the District Court prior to the commencement of deliberations.

Accordingly, on January 24, 1973, the final revised EIS was to be submitted to the Council on Environmental Quality (CEQ), thereby allowing at least thirty (30) days for public and agency comment on the statement prior to the taking of any action, as required under Section 10 of the then applicable CEQ Guidelines, 36 F.R. 7724. On February 28, 1973, the hearing on the final revised EIS was to be held, after which the District Court would determine whether the EIS, as supplemented, fully complied with the requirements set down in the NEPA. At the February 28th hearing, however, some confusion arose as to the exact date on which the draft supplemental data was first submitted to CEQ. The hearing was therefore postponed until March 9, 1973, in order that the federal defendants could determine precisely when the statement was filed and consequently how long it had rested with the CEQ.

At the continued hearing on March 9, 1973, it was revealed that the draft revised EIS had been supplied to the CEQ on November 28, 1972, and that the requirements of the CEQ Guidelines had thereby been satisfied. Further, counsel for both the EDF and the Sierra Club waived any objections which they may have had to any failure to comply with the filing re-

quirements of the CEQ Guidelines. Thus, the District Court proceeded with the continued hearing on the merits as to the adequacy of the revised EIS for the New Melones Project.

At the hearing, Petitioners offered three reasons why the court should find that the federal defendants had not fully complied with the NEPA. These were, first, that as amended the EIS was still deficient in that it did not deal with any of the deficiencies alleged to exist in the original May, 1972, EIS, but, rather, dealt exclusively with the use of the conservation yield of the New Melones Dam. Second, that the supplemental EIS was itself inadequate because (a) it did not assign priorities of need for water among the service areas that it suggested may potentially use New Melones water, (b) it omitted all facts regarding the current water supply situation in the Central Valley Project (CVP)[1] and the need for additional irrigation in California, and (c) it failed to discuss possible alternate sources of supply within the CVP. Finally,

[1]The Federal Bureau of Reclamation's Central Valley Project is a comprehensive plan designed to solve water problems unique to this state's central region. It was conceived as, and remains, a gigantic undertaking aimed at redistributing the principal fresh water resources of the state. The plan is based on the capture and storage of the waters of the Sacramento and San Joaquin Rivers and many of their tributaries, and the transportation of those waters to different areas through an elaborate system of reservoirs, canals, and pumps. The Central Valley Project has improved navigation, provided flood control, furnished water for municipal, agricultural, and industrial use, enhanced fish and wildlife values, helped repel salinity in the Sacramento-San Joaquin Delta, and provided recreational opportunities for millions of persons. (See Harold E. Rogers and Alan H. Nichols, *Water For California*, Vol. I, pages 42 and 43). The CVP is also described in the opinion of the United States Supreme Court in *Ivanhoe Irrigation District v. McCracken* (1958) 357 U.S. 275 at 279-284.

Petitioners contended that the project should be preliminarily enjoined until the State Water Resources Control Board reached a decision on the applications for water rights permits for the project. After careful consideration of the matter Judge Renfrew found these contentions to be without merit and held in his Opinion and Order of March 16, 1973, *EDF v. Armstrong* (1973) 356 F.Supp. 131, that the original EIS as supplemented was now in complete compliance with the NEPA.

On July 9, 1973, Petitioners' appeals were argued orally in the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the judgments of the District Court on November 9, 1973, and vacated the stay which it had previously granted on January 18, 1973. The full opinion of the Court is contained in *EDF v. Armstrong* (1973) 487 F.2d 814.

ARGUMENT

I. THE DISCUSSION OF CVP WATER SUPPLY WHICH IS CONTAINED IN THE EIS FOR THE NEW MELONES PROJECT IS ADEQUATE.

Petitioners assert that the EIS is deficient in that it fails to expound at great length on the factual statement contained therein to the effect that "there is not enough water available and new water sources are needed." They assert, in essence, that an EIS must not only discuss the environmental ramifications of the project, but must justify the need for the project as well. Were this a new project, Respondent-

Intervenors might be inclined to agree with this analysis, but this is not a new project. NEPA is here being applied retroactively to an on-going project already authorized by the Congress, and the Respondent-Intervenors respectfully submit that Congress would not have given authorization to a project for which it saw no need.

Moreover, the fault which Petitioners purport to find with the EIS is not really the lack of detailed information, but the ultimate conclusion which has been reached by the federal defendants—i.e., that the CVP bucket is not full. A quick reference to the proceedings in the District Court will confirm this fact.

Petitioners urged the District Court to find that the EIS affirmatively misrepresents the need for water in the CVP, and to require that their viewpoint with respect to whether or not additional water is needed within that system be given equal billing with that of those persons charged with state and federal water planning and management. This position was supported partly with unfounded assertions regarding the amount of uncommitted water available in California and partly with reference to several studies predicting economic ruin for California agriculture if new irrigated acreage is developed. At page 138 of its second opinion (356 F.Supp. 131), the District Court rejected all such contentions for the following reasons:

> "As a second reason for finding the supplemental EIS itself to be inadequate, plaintiffs allege that

it does not contain any information about the current availability of water in the Central Valley Project or the need for additional irrigation in California. This omission is affirmatively misleading, it is claimed, because it leads the decisionmakers to believe that there is now a critical shortage of supply in the Central Valley Project and a need for more irrigation in California, when, in fact, there is substantial controversy as to both these needs.

"Initially, it must be recognized that plaintiffs are not claiming that the EIS does not contain information as to current supply and irrigation needs, but, rather, they are disputing the sense of the information which is contained therein. Accordingly, the Court determines that the deficiencies alleged go not to the adequacy or inadequacy of the EIS as revised, but to the merits of the project itself. The latter are something upon which Congress and not the Courts must pass, and plaintiffs' objections must therefore fail. Under NEPA the courts' inquiry must be directed toward ascertaining whether or not certain information is included rather than to a determination of the truth or accuracy of the impression created thereby, absent an allegation that the agency had acted arbitrarily or capriciously in its presentation of information. 5 U.S.C. §706(2)(A).

"Even if the Court were to assume that plaintiffs were alleging that the Corps and the Bureau had so acted in their preparation of the supplemental EIS, thus requiring the Court to go to the merits somewhat, plaintiffs would fail. Their claims are based upon a chart entitled 'Central

Valley Project—Sacramento River Basin and Delta Water Supply—1972 Contract Quantities—Present and Projected Uses,' attached as Exhibit Four to their memorandum of February 26, 1973. On the basis of that chart, it is claimed by plaintiffs that there is a greater supply of water than is presently under contract. Their claims must fail for two reasons. First, the chart deals with water under contract only and does not include present and future requests for water, which are in fact quite substantial. Second, aside from these additional requests for water, other important water demands were not accounted for on the chart. Aside from the contracted for water and assuming, no matter how unrealistically, that the state itself does not increase its present level of water diversion, no account has been made for the increased demands on the various projects for purposes of water quality control under Decision 1379 and Decision 1400 which the State Water Resources Control Board might see fit to impose upon the permits granted the projects. Also to be considered are the very substantial water demands for fish and wildlife preservation being urged at the water rights hearings by the State Department of Fish and Game.

"Accordingly, the Court finds a demonstrated need for the New Melones water, at least substantially enough to rebut any possible charge that defendants have acted arbitrarily or capriciously in stating that 'There is not enough water available and new water sources are needed.' EIS at B-19. Accordingly, plaintiffs' second alleged deficiency in the supplemental EIS must fail." (Footnotes omitted)

At both the District Court and the appellate level, as evidenced by the preceding quoted material, Petitioners objected to the truth of the statements in the EIS concerning CVP water supply. Now, after both the District Court and the Ninth Circuit have found against them on these contentions, Petitioners are attempting to argue that the lower courts should have found the EIS to be inadequate for not justifying the need for additional water supplies within the CVP.

The real problem arises here in deciding the basic issue of fact—i.e., is there a need for additional water within the CVP. Based upon the testimony and affidavits before him prior to March 9, 1973, and based upon the unrebutted testimony of Anthony Kasjaka, a supervisory hydraulic engineer with the Bureau of Reclamation who was called on March 9, 1973, to testify to this exact point, the District Court decided the preliminary factual question regarding CVP supply against the petitioners. The Ninth Circuit has affirmed that finding. A mere dispute over a factual finding should not be treated as grounds for granting a Writ of Certiorari where no real questions of law are involved. Petitioners have gone to great lengths to convince the Court that novel questions of law are involved in their contentions with respect to CVP water supply, but the only real question is factual—Does the CVP have enough water to meet existing and projected future water needs within California? Defendant-Intervenors respectfully submit that notwithstanding petitioners' difference of opinion with the federal respondents, it would be improvident

to burden this Court with the task of resolving this factual dispute for still a third time.

II. THE STANDARD OF REVIEW APPLIED IN THE LOWER COURTS WAS PROPER AND IN ANY EVENT HAS NOT RESULTED IN REVERSIBLE ERROR.

Petitioners have conceded at page 22 of their petition that "the touchstone for judicial review of administrative action, *as both lower courts recognized,* is 5 U.S.C. §706(2)." (emphasis added) Thus, it is not the legal tools applied by the lower courts which petitioners question here, but the vigor with which they were applied. Once again, petitioners have failed to state a complaint which entitles them to have this case reviewed by a writ of certiorari. Their objections here, like those with respect to CVP water supply, do not relate to questions of law, but rather to a question of fact—whether the lower courts reached the proper conclusion in determining the EIS to be adequate.

Petitioners have seized upon the reference in the trial court opinion (356 F.Supp. 131, 138) relating to the arbitrary and capricious standard in an effort to muddy the record as to the standard of review which was applied by Judge Renfrew of the District Court. Four extensive days of hearings including evenings and a Saturday session were held on the adequacy of the EIS here in question. The requirements of NEPA and the adequacy of the EIS as measured against those requirements were thoroughly explored by the court during the course of those hearings.

The excerpt previously quoted from the second written opinion of the District Court reveals both the reason for the application of the arbitrary and capricious standard, and the fact that the court was applying that standard to only one of petitioners' claims, to-wit, the claim that the EIS affirmatively misrepresented the need for additional irrigation water in the CVP. A close reading of the court's opinion of March 16, 1973, reveals that the court did not commit error. Judge Renfrew's discussion was couched in the alternative. He ruled on the one hand that petitioners' claims did not go to the adequacy but to the very truth of the NEPA statement. Then, giving petitioners the benefit of the doubt by assuming for the sake of argument that they had raised the issue of arbitrary and capricious agency action even though it was clear from the record they had not, he went on to conclude, based upon the previously alluded to unrebutted testimony of Anthony J. Kasjaka, that even if they had raised that issue they could not prevail because the facts had been accurately set forth in the EIS. If anything, the inclusion of this discussion in the court's opinion represents an abundance of insight into petitioners' claims and a deep concern that they be granted a fair hearing. The application of the arbitrary and capricious standard was not limiting in effect, but expanding and was not reversible error.

III. THE DECISION (NO. 1422) OF THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD WAS NOT A DEVELOPMENT REQUIRING THE FILING OF A SUPPLEMENTAL EIS.

Decision 1422 held that the United States Bureau of Reclamation had not demonstrated a specific plan for applying all of the New Melones project water to an immediate beneficial use. The board reserved jurisdiction over the matter authorizing the Bureau to re-open the question at such future time as it could demonstrate the existence of a definite plan of application. In announcing its decision, the board renounced jurisdiction over construction of dams and over flood control in general, granted permits for fish and recreation and water quality flows, and admitted that "the record contains substantial evidence that the full conservation yield of the New Melones Project, and more, will eventually be needed in Tuolumne, Calaveras, San Joaquin and Stanislaus Counties" (page 16).

This decision is in no way inconsistent with the Bureau of Reclamation position before the District Court, and is affirmatively consistent with the decision of the District Court. Judge Renfrew recognized the ultimate need for the conservation yield of New Melones Dam and the present inability of the USBR to determine with accuracy where that water will be applied in 1980. The State Water Resources Control Board also recognized the ultimate need and the inability of the Bureau to come up with specific plans at this time. Both the District Court and the board have reached a solution which allows operation

of the project to meet present needs for water quality, fish and wildlife, and flood control benefits, while retaining jurisdiction in order to allow the Bureau to amplify its plans with respect to the conservation yield, as those plans develop. The appellate court has given its approval to this approach.

Although Decision 1422 may seem inconsistent with the findings of the lower courts concerning the adequacy of the EIS, that inconsistency can be explained by the differing standards of review applied. The State Board reached a policy position that project benefits did not outweigh detriments and the project should, therefore, not proceed as planned. The courts, on the other hand, looked only to the adequacy of the EIS, leaving the question of proceeding with the project to the appropriate decision making body, i.e., the Congress.

The questions relating to whether the project can or should proceed as planned in view of Decision 1422 will be determined in Congress and/or in litigation presently pending in the District Court for the Eastern District of California (See p. 25 Petition for Writ of Certiorari). The question facing the lower courts and this court in this proceeding is whether the adequacy of the EIS as a decision making tool for the Congress depends upon inclusion therein of discussion relating to Decision 1422.

Decision 1422 has no environmental ramifications which have not already received adequate discussion in the EIS. Its principal impacts are on project fea-

sibility rather than on environmental effects. As in the case of *EDF v. Corps of Engineers,* 342 F.Supp. 1211, 1217-1218, "there is nothing to prevent either the agency involved or the parties opposing proposed agency action from bringing new or additional information, opinions, and arguments to the attention of the upstream decision makers even after the final EIS has been forwarded to CEQ". The record below clearly establishes that the Council on Environmental Quality is aware of Decision 1422. Assuredly the Congressional decision makers are also aware of it, and can consider its ramifications without the necessity of preparing a supplemental EIS to discuss it.

As was noted by the appellate court at pages 821 and 822 of its opinion *(EDF v. Armstrong,* 487 F.2d 814) the NEPA has now served its purpose:

> "The District Court has twice examined the adequacy of the EIS assuming optimum operating conditions as projected by the authorizing agency and has held that it is adequate as revised and supplemented. We have examined those proceedings carefully and agree with the District Court. The NEPA has served its purpose. It has stimulated a full examination of all objections, adverse consequences, alternatives and, with the decision of the SWRCB, possible operational limitations. It now becomes a question of project justification in the light of all known and possible consequences. Future changes which may have a significant effect upon the environment, not heretofore examined, may be brought to the attention of the District Court under its reserved jurisdiction." (footnotes omitted).

If the NEPA is construed, as urged by Petitioners, to require perpetual revision and processing of environmental impact statements, it will result in an endless cycle of planning and studying without actual construction ever getting under way. Respondent-Intervenors do not think such a result was intended by the Congress in enacting the NEPA. Clearly the line must be drawn so that formal planning under the mandates of NEPA may give way to actual implementation. This does not mean that new information should not be made available to the decision makers as it arises, but it does mean that there is a point at which the preparation of decision making tools must give way to the making of decisions with full view of the fact that changed circumstances are always a possibility. The New Melones project has reached that point now. It has already been delayed over a year as a result of these proceedings. Each year of delay means one more year that the residents of the Stanislaus River basin must run the risk of severe flooding. To require supplementation of the EIS to discuss Decision 1422, a document which speaks for itself, can result in no useful purpose. Moreover, the delay which such supplementation and processing would entail could result in the project not being in place and operative at the time of some future major flood.

CONCLUSION

For these reasons Respondent-Intervenors respectfully urge that the Petition for Writ of Certiorari in this proceeding should be denied.

Dated, February 27, 1974.

Respectfully submitted,

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No. 73—1179

In the Supreme Court of the United States

OCTOBER TERM, 1973

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.,
PETITIONERS

v.

GILBERT STAMM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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537-869—74——1

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D) is reported at 487 F. 2d 814. Two of the opinions of the United States District Court for the Northern District of California (Pet. App. A, C) are reported at 352 F. Supp. 50; 356 F. Supp. 131. The other opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1973. The petition for a writ of certiorari was filed on February 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly determined that the environmental impact statement in this case, as supplemented, was adequate.

2. Whether the trial court properly deferred consideration of the effect of the California State Water Resources Board's decision pending the outcome of separate litigation of whether the State Board's decision is binding upon the federal defendants and the operation of the congressionally authorized project.

STATEMENT

Petitioners seek to enjoin further work being done on the public works project, known as the New Melones Dam, on the Stanislaus River in California. This dam was originally authorized by Congress under the Flood Control Act of 1944, and reauthorized under the Flood Control Act of 1962, 76 Stat. 1180, as a multi-purpose project for flood control, irrigation, fish and wildlife enhancement, power generating and water quality control. A diversion tunnel, a 25 million dollar project, had been substantially completed prior to the petitioners' instituting this action seeking to enjoin the awarding of the main construction contract.

The dam as authorized is to be constructed by the Corps of Engineers and operated by the Bureau of Reclamation of the United States Department of the Interior. After the enactment of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.* (NEPA), an environmental impact statement (EIS) was prepared, circulated for comment and filed with the Council on Environmental Quality.

Petitioners brought an action challenging the adequacy of the EIS. A hearing on the petitioners' motion for a preliminary injunction and the trial on the merits were consolidated and tried. In its first opinion (Pet. App. A; 352 F. Supp. 50) the district court denied the petitioners' request for a preliminary injunction and found the EIS's discussion of the uses of the major portion of the water to be impounded by the dam to be adequate, but ordered the preparation of a supplemental EIS as to the "conservation yield" which would be available in eight to ten years. The EIS as originally prepared had not covered the "conservation yield" due to the fact that this water would not become available for a period of from three to ten years after the completion of the dam, depending upon precipitation. The federal officials therefore had proposed to file a separate EIS dealing with this "conservation yield" at a time nearer to the dam's actual operation and the water's availability. The district court concluded, however, that where the ultimate operation of a project is still in doubt at the time the EIS must be filed, a tentative discussion or "best estimate" is nonetheless required. The court also directed that prior to actual use, a revised or supplemental statement should be filed. After a supplemental EIS was prepared the court held a hearing as to the adequacy of the supplemental EIS and concluded that the EIS, as revised, "* * * complies fully with the requirements of NEPA" (Pet. App. C; 356 F. Supp. 139–140). The district court further held that it would be inappropriate to enjoin the entire project pending a decision of the State Water Resources

Control Board. Finally the court retained jurisdiction to insure that a final EIS would be filed prior to operation of the project.

At petitioners' request the court of appeals stayed the awarding of the contract for the dam structure pending its decision in this case,[1] but expedited the briefing and argument of the appeal. On the merits the court of appeals (Pet. App. D) affirmed the decisions of the district court, holding that it would be improvident for the federal officials to make a priority commitment now as to the conservation yield because the waters would not be available for at least eight years and that the retention of jurisdiction by the district court throughout the project's development provided sufficient protection for all parties. The court stated that "The EIS as revised has been reviewed on appeal and we agree with the judgment of the District Court as to its adequacy under NEPA requirements, as measured by 5 U.S.C. § 706(2)(A)" (Pet. App. D; 487 F. 2d 817).

ARGUMENT

1. The determination by the court of appeals that the EIS, as supplemented, fully complies with the provisions of NEPA is based upon its careful review of the substantial record made in the district court proceedings.

[1] The parties stipulated that the approximate increase in costs should the project be delayed six months would amount to 12.6 million dollars (Pet. App. A; 352 F. Supp. at 60). As a result of this litigation the construction season was lost, the contractor withdrew his bid and the project has been readvertised and bids have been opened.

The appellate court concluded that (Pet. App. D; 487 F. 2d 821–822):

> The District Court has twice examined the adequacy of the EIS assuming optimum operating conditions as projected by the authorizing agency and has held that it is adequate as revised and supplemented. We have examined those proceedings carefully and agree with the District Court. The NEPA has served its purpose. It has stimulated a full examination of all objections, adverse consequences, alternatives and, with the decision of the SWRCB, possible operational limitations. It now becomes a question of project justification in the light of all known and possible consequences. Future changes which may have a significant effect upon the environment, not heretofore examined, may be brought to the attention of the District Court under its reserved jurisdiction.
>
> We affirm the judgments of the District Court and vacate all orders granting injunctions by this court.

With respect to petitioners' suggestion (Br. 16) that the EIS is inadequate because it fails to evaluate precisely the need for the irrigation potential of the dam, we invite the Court's attention to the supplemental EIS which to the extent possible covers this matter. Since this water will only become available in eight to ten years, the discussion is necessarily a "best estimate." It is the government's intention to file an additional EIS nearer in time to the obtaining of the water, which will be based on current data. However, the supplemental EIS, required by the district court, considered this factor to the fullest extent

possible. This supplemental EIS has been examined by the courts below and determined to be adequate. In addition, the district court has required that an additional EIS be prepared prior to operation of this project and retained jurisdiction to insure compliance. As the court of appeals pointed out in *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275, 1280 (C.A. 9):

> If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated.

2. The standard of review utilized by the courts below was proper. The district court conducted full evidentiary hearings and heard testimony of "the administrative officials who participated in the decision * * * explaining their action." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420. After extensive hearings on the alleged deficiencies of the EIS, the district court ordered the EIS supplemented in part, and then determined that, as revised, the EIS was adequate. The court of appeals stated that it had carefully examined those proceedings and agreed with the district court.

There is no real conflict among the circuits as to the applicable standards for review of the contents of an EIS. The courts of appeals have consistently held that judicial review of the "substantive" agency decision, if available at all, is governed by the "arbitrary" and "capricious" standard of 5 U.S.C. 706(2)(A). *E.g.*,

Jicarilla Apache Tribe of Indians v. *Morton*, 471 F. 2d 1275, 1281 (C.A. 9); *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Commission*, 449 F. 2d 1109, 1115 (C.A.D.C.); *Save Our Ten Acres* v. *Kreger*, 472 F. 2d 463, 465–466 (C.A. 5).

By contrast, the adequacy of the contents of impact statements has been more closely reviewed by the courts, under a standard of "reasonableness." *E.g.*, *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827, 834 (C.A.D.C.); *National Helium Corporation* v. *Morton*, 486 F. 2d 995 (C.A. 10).

While there has been some debate in the Ninth Circuit as to the applicable standard, that Circuit appears now to be in conformance with other Circuits. In *Life of the Land* v. *Brinegar*, 485 F. 2d 460, certiorari denied, No. 73–1088, April 22, 1974, and in the opinion below, panels of the Ninth Circuit spoke of applying the "arbitrary" and "capricious" standard of 5 U.S.C. 706 (2)(A) to the review of the contents of an EIS. However, in *Lathan* v. *Volpe*, Nos. 72–2932 and 72–2974, decided December 7, 1973, a different panel of the Ninth Circuit more recently pointed out that this formulation was mistaken (slip op. p. 4):

> [5 U.S.C. 706] subsection (2)(D) provides that we may set aside agency action if we find it to be without observance of procedure required by law. We regard the question whether an Environmental Impact Statement complies with the requirements of NEPA as a procedural question, governed by § 706(2)(D). See *Jica-*

> *rilla Apache Tribe, supra,* 471 F. 2d at 1280–1. In *Life of the Land* v. *Brinegar,* 9 Cir., 1973, * * * we quoted *Jicarilla Apache Tribe, supra,* regarding substantive decisions, but then apparently applied § 706(2)(A) to the question whether the EIS satisfied the requirements of NEPA. This appears to be a misreading of *Jicarilla Apache Tribe,* but our reading of *Life of the Land* convinces us that the result would be no different if we had thought that § 706(2)(D) applied.

The *Lathan* formulation, which we believe to be in conformity with the law of other circuits, supports the holding below, for the court of appeals held that the district court's opinion could be supported under either standard. After opting for 5 U.S.C. 706(2)(A) as the proper standard, the court below specifically stated (Pet. App. D; 487 F. 2d 817, n. 7):

> *But see Jicarilla Apache Tribe of Indians,* 471 F. 2d 1275, 1280 (9th Cir. 1973), which uses 5 U.S.C. § 706(2)(D) as the appropriate standard, permitting appellate review of findings and conclusions found to be "without observance of procedure required by law." Under the circumstances of this case, either test would lead to the same result.

Whatever the articulated standard, the courts—including the panel below—have reviewed impact statements in essentially the same way. The claims of alleged non-compliance with NEPA have been measured against the agency's record (the EIS) and the evidence adduced at trial. Here, the petitioners were given an opportunity in extensive hearings before the district court to show why the EIS was inadequate.

It is difficult to conceive how a more detailed review could be made. An examination of the district court's opinions demonstrates that petitioners' complaint, directed to the court's choice of words, is really based upon their dissatisfaction with the results.

3. The State Water Resources Control Board's decision is not relevant to this case. There is pending now in *United States* v. *State of California State Water Resources Control Board, et al.*, Civil No. S–3014, Eastern District of California, a case which will determine whether this federally authorized project is to be subject to the control of the California State Water Resources Control Board. The federal defendants have taken the position that the peculiarities of state law or regulations in the use of federally authorized projects are of no effect. See *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275; *City of Fresno* v. *California*, 372 U.S. 627. In any event, even if the State Board's decision is found to be binding on the federal agencies, its only effect would be to defer slightly the beneficial use of the full conservation yield of the project. Most of the project purposes were permitted by the Board's decision. The decision does not render the project useless or fundamentally alter its value.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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